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**TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1938**

**No. 367**

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**FRANK EICHHOLZ, APPELLANT,**

*vs.*

**PUBLIC SERVICE COMMISSION OF THE STATE  
OF MISSOURI ET AL.**

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**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE WESTERN DISTRICT OF MISSOURI**

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**FILED SEPTEMBER 20, 1938.**



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[fol. a] Citation, in usual form, showing service on James H. Linton et al., filed July 12, 1938, omitted in printing.

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[fol. 1]

**IN UNITED STATES DISTRICT COURT, CENTRAL  
DIVISION, WESTERN JUDICIAL DISTRICT OF  
MISSOURI**

In Equity. No. 660

**FRANK EICHHOLZ, Plaintiff,**

**vs.**

**SAM O. HARGUS, W. M. ANDERSON, JOHN S. BOYER, ALBERT  
D. NORTON, John A. Ferguson, Public Service Commis-  
sioners of the State of Missouri; Roy McKittrick, Attor-  
ney-General of the State of Missouri; and B. M. Casteel,  
Superintendent, State Highway Patrol, Defendants**

**BILL OF COMPLAINT—Filed December 31, 1936**

To the Honorable Judges of the District Court of the United States in and for the Central Division of the Western Judicial District of Missouri:

Frank Eichholz, a citizen and resident of the State of Missouri, bring this, his bill of complaint, against Sam O. Hargus, W. M. Anderson, John S. Boyer, Albert D. Norton, and John A. Ferguson, Public Service Commissioners of the State of Missouri; Roy McKittrick, Attorney General of the State of Missouri; and B. M. Casteel, Superintendent, State Highway Patrol, all citizens and residents of the State of Missouri and the Western District thereof, and thereupon complains and avers:

**I**

Plaintiff now is and at all times hereinafter mentioned was a citizen of the State of Missouri and a resident of the [fol. 2] City of St. Louis; and that defendants, Sam O. Hargus, W. M. Anderson, John S. Boyer, Albert D. Norton, John A. Ferguson, Public Service Commissioners of

the State of Missouri; Roy McKittrick, Attorney General of the State of Missouri, B. M. Casteel, Superintendent, State Highway Patrol, are now and at the time of the commencement of this suit, were citizens and residents of the County of Cole in the State of Missouri and at all of said times residents and inhabitants of the Western District of Missouri.

## II

This suit is an action of a civil nature; the matter in dispute herein exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000.00) and is a controversy between citizens of the same state, seeking to test the constitutionality of an order of the Public Service Commission of Missouri which does interfere with interstate commerce, and hence arises under the Constitution and laws of the United States, as hereinafter more particularly shown.

## III

Plaintiff states that Sam O. Hargus, W. M. Anderson, John S. Boyer, Albert D. Nortoni, John A. Ferguson, Public Service Commissioners of the State of Missouri, were at the time of the commencement of this suit and are now the duly constituted, appointed, qualified and acting Public Service Commission of the State of Missouri charged with the duty of enforcing the provisions of an act of the Missouri Legislature, to-wit: Article 8, Chapter 33, R. S. 1929, as amended by Laws 1931, page 304; that Roy McKittrick was at the time of the filing of this suit, and is now the duly elected, qualified and acting Attorney-General of the State of Missouri, charged by law with the duty, when called upon, of enforcing the Constitution and laws of the State of Missouri; that B. M. Casteel was at the time of the filing of this [fol. 3] suit, and is now the duly appointed, qualified and acting Superintendent, State Highway Patrol, charged by law with the duty of enforcing the laws of the State of Missouri.

## IV

Plaintiff states that since the 23d day of November, 1934, he has been continuously engaged in the transportation for hire of personal property as a common carrier in interstate commerce.

## V

Plaintiff states he operates in the prosecution of his business as a common carrier by motor vehicles in interstate commerce a terminal building located at 511 South Second Street, St. Louis, Missouri; a terminal building located at Shawnee and Adams Street-, Kansas City, Kansas; a terminal building located at 309 North Rock Island Avenue, Wichita, Kansas; a terminal building located at 115 Eleventh Street, Des Moines, Iowa; and a terminal building located at 611 South Main Street, Burlington, Iowa; that plaintiff owns and operates thirty-seven (37) pieces of motor equipment in rendering service in the transportation of property in interstate commerce, and has leased thirty-two (32) pieces of motor equipment which he also operates in rendering service in the transportation of property between the states of Illinois, Missouri, Kansas, and Iowa.

## VI

Plaintiff states that he has invested large sums of money in the terminal facilities above set out, and has invested large sums of money in motor vehicles, trucks, tractors and semi-trailers as above set out to facilitate the transportation of property by him as a common carrier; that he has established regular and convenient routes of travel for said motor vehicles between said terminals; that he maintains at said terminals agents and employees for receiving, check-[fol. 4] ing, billing, and forwarding property for transportation; that he maintains proper and sufficient motor equipment, commonly known as road trucks, for the transportation of property between terminals, and provides and maintains at said terminals motor vehicles for rendering pickup and delivery service between his terminals and consignors and consignees within the commercial area of said terminals as set out in plaintiff's tariffs now on file with the Interstate Commerce Commission.

## VII

Plaintiff further states that he assembles at his terminals large numbers of shipments through the use of his pick-up equipment, which shipments are then loaded into the motor vehicles commonly known as road trucks and transported by said road trucks to the terminal to which the shipments

are destined, and are there transferred to the dock and reloaded into the various delivery trucks to be delivered to the various consignees in the commercial area of that terminal.

### VIII

Plaintiff states that the Seventy-fourth Congress of the United States passed an act, approved August 9, 1935, known as the "Motor Carrier Act, 1935." Plaintiff further states that by said Act the Interstate Commerce Commission was given exclusive jurisdiction to grant certificates of convenience and necessity to motor carriers in interstate commerce; to regulate rates and service of said motor carriers in interstate commerce; that in conformity to said Motor Carrier Act of 1935 this plaintiff filed with the Interstate Commerce Commission an application on Form BMC 1, as provided by said Interstate Commerce Commission, said application being Docket No. MC-61959; filed with the Interstate Commerce Commission a schedule of rates for said transportation; and has complied with all the requirements of said "Motor Carrier Act, 1935" and the orders of the Interstate Commerce Commission.

[fol. 5]

### IX

Plaintiff further states that on the 23d day of November, 1934, the Public Service Commission issued to plaintiff an Interstate Permit No. T-3734, which Permit granted to plaintiff authority to operate interstate as a freight-carrying motor carrier over the highways of Missouri; that plaintiff filed with the Public Service Commission of Missouri proper insurance and paid all license fees and taxes as required by the Public Service Commission Law of Missouri, and fully complied in all respects with the Laws of Missouri and the orders of the Public Service Commission.

Plaintiff states that on July 22, 1936, the Public Service Commission instituted a proceedings to revoke the authority of Frank Eichholz, doing business as Riteway Motor Service, and holder of Interstate Permit No. T-3734 heretofore issued by the Public Service Commission of Missouri, said proceedings being Docket No. Case T-5330; that on the 10th day of December, 1936, the Commission issued its order in Case T-5330 and revoked the authority of plaintiff to operate in interstate commerce as a freight-carrying

motor carrier ; that by subsequent order of said Public Service Commission the effective date of its order of December 10th was extended to December 30, 1936.

## X

Plaintiff further states that on the 16th day of December, 1936, he filed with the Public Service Commission of Missouri an application for a rehearing in said Case No. T-5330, and on the 23d day of December, 1936, the Commission issued its order overruling said application for a rehearing. Plaintiff further states that under the decisions of the Courts of Appeal and the Supreme Court of Missouri no appeal can be taken to the courts of last resort in the State from orders of the Public Service Commission.

Plaintiff further states that the action of the Public Service Commission in issuing said order of December 10, 1936, was unlawful, unreasonable, arbitrary and capricious in that the Public Service Commission of Missouri attempted to exercise power and authority expressly delegated by the Congress of the United States to the Interstate Commerce Commission.

Plaintiff further states that said order of the Public Service Commission issued on December 10, 1936, is a direct burden and interference with interstate commerce and deprives plaintiff of his right to engage in interstate commerce, and deprives the public of the use of plaintiff's facilities in the transportation of property in interstate commerce.

## XI

Plaintiff states that because of the unwarranted and illegal assumption of authority and power by the Public Service Commission in issuing said order, the above named defendants are threatening to arrest the drivers of said plaintiff's vehicles, thereby destroying the business of the plaintiff ; that the continual arresting of the drivers of the plaintiff by said defendants and the filing of information purporting to charge this plaintiff with violations of law will work irreparable injury and damage to plaintiff's property, and will cause irreparable damage to the public who are dependent on plaintiff for the transportation by plaintiff of their property ; that said order of the Public Service Commission is contrary to and in violation of the Motor

Carrier Act of 1935, and is in violation of Article 3; and Sections 1, 24 and 25 of Article 4 of the Constitution of Missouri; and is in violation of Section 1 of Article 14 of the Constitution of the United States; and Section 3 of Article 1 of the Constitution of the United States.

[fol. 7]

## XII

Plaintiff further states that unless the above named defendants are restrained and enjoined from arresting and filing criminal charges against and prosecuting plaintiff, his drivers and employees that plaintiff will be required to defend a multiplicity of criminal actions; that plaintiff's property and business will be destroyed; that plaintiff has no other adequate remedy at law.

Wherefore, Plaintiff prays that the above defendants and each of them be temporarily and permanently enjoined and restrained from arresting, prosecuting, or assisting in the prosecution of any criminal suits against plaintiff from using the highways of the State of Missouri in the transportation of property for hire in interstate commerce by motor vehicle, and for such other relief as to the Court may seem just and proper.

Frank Eichholz, Plaintiff, by D. D. McDonald, Solicitor for Plaintiff.

[fol. 8] *Duly sworn to by Frank Eichholz. Jurat omitted in printing.*

[fol. 9]

## IN UNITED STATES DISTRICT COURT

NOTICE OF APPLICATION FOR TEMPORARY RESTRAINING ORDER  
WITH ACKNOWLEDGMENT OF SERVICE THEREON—Filed December 31, 1936

You are hereby notified that plaintiff, Frank Eichholz, will at ten o'clock A. M. on the 31st day of December, 1936, or as soon thereafter as counsel can be heard, at the Federal Court House in Kansas City, Missouri, make application to Hon. Merrill E. Otis, Judge of the District Court of the United States, Central Division, Western Judicial District of Missouri, for a restraining order to enjoin you from arresting, prosecuting, or assisting in the prosecution of

any criminal suit against the plaintiff because of his use of the highways of the State of Missouri in the transportation of property for hire in interstate commerce until some further order be made in the premises, when and where you can appear, if you see proper.

Frank Eichholz, by D. D. McDonald, His Attorney.

Received copy of the above notice together with copy of bill of complaint this 30th day of December, 1936.

James P. Boyd, General Counsel P. S. C. of Missouri.

Roy McKittrick, by J. E. Taylor. Col. B. M. Casteel, by K. K. Johnson.

[fol. 10] IN UNITED STATES DISTRICT COURT

TEMPORARY RESTRAINING ORDER, WITH RETURN OF SERVICE  
THEREON—Filed January 5, 1937

This matter coming on to be heard upon the petition of Frank Eichholz, plaintiff herein, and upon reading the petition it appearing that upon the facts stated in the petition plaintiff is entitled to the relief prayed for, it is ordered that a temporary restraining order be granted herein enjoining the defendants, their servants, agents, and employees from arresting, prosecuting, or assisting in the prosecuting of any criminal suit against plaintiff for using the highways of the State of Missouri in the transportation of property for hire by motor vehicles until the 11th day of January, 1937, and until the further orders of this Court.

Merrill E. Otis, Judge of the United States District Court, Central Division of the Western District of Missouri.

#### Marshal's Return

I do Hereby Certify That I received this writ at Jefferson City, Mo. on Dec. 31, 1936, and executed the within Writ, by leaving a copy of the original writ with Captain R. E. Moore, who is authorized to accept service in the absence of the Supt. B. M. Casteel, of the Highway Patrol of the State of Missouri, and on Dec. 31, 1936, at Jefferson City, Mo. I left a copy of the within Writ at the office of Sam O. Hargus, Chairman of the Public Service Com. of the State of Mo., with his Sect. Robert E. Holliway, in the absence

of the above named, and in the absence of the within named Roy McKittrick, Attorney General of the State of Mo. I left a copy of the within Writ at the office of the above named [fol. 11] in Jefferson City, Mo. with his Sect. J. L. Retzen-thaler, who is authorized to accept service in the absence of the within named.

All done in Cole County, in said Division and District on Dec. 31, 1936.

H. L. Dillingham, U. S. Marshal, by J. H. Polson, Deputy.

[File endorsement omitted.]

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[fol. 12] IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER OF PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, SAM O. HARGUS, W. M. ANDERSON, JOHN S. BOYER, ALBERT D. NORTONI, JOHN A. FERGUSON, CONSTITUENT MEMBERS OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI—Filed January 22, 1937

Come now the Public Service Commission of the State of Missouri and its constituent members, Sam O. Hargus, W. M. Anderson, John S. Boyer, Albert D. Nortoni, John A. Ferguson, Defendants herein, and for separate answer to plaintiff's Bill state:

### I

These Defendants admit the allegations contained in the first paragraph of the Bill.

### II

Admit that this suit is an action of a civil nature; deny the dispute herein exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000.00); deny it is a controversy between citizens of the same state seeking to test the constitutionality of an order of the Public Service [fol. 13] Commission of Missouri which interferes with interstate commerce, and deny that this question arises under the Constitution and laws of the United States, as alleged in paragraph II of the Bill.

### III

These Defendants admit the allegations contained in the third paragraph of the Bill.

## IV

These Defendants deny that since November 23, 1934 plaintiff has been continuously engaged in the transportation for hire of personal property as a common carrier in interstate commerce, as alleged in paragraph IV of the Bill.

## V

These Defendants answering the fifth paragraph of the Bill specifically deny plaintiff operates a terminal building located at Shawnee and Adams Streets in Kansas City, Kansas.

Further answering, these Defendants say they have no information sufficient to form a belief as to the allegation contained in the fifth paragraph of the Bill as to the plaintiff operating a terminal building located at 511 South Second Street, St. Louis, Missouri, a terminal building located at 309 North Rock Island Avenue, Wichita, Kansas, a terminal building located at 115 Eleventh Street, Des Moines, Iowa, and a terminal building located at 611 South Main Street, Burlington, Iowa, and therefore deny that plaintiff operates said terminal buildings.

Further answering, these Defendants state they have no information sufficient to form a belief as to the number of pieces of motor equipment plaintiff has in rendering service in the transportation of property for hire nor the number [fol. 14] of pieces of motor equipment plaintiff has leased for said purpose and therefore deny plaintiff owns and operates thirty-seven (37) pieces of motor equipment in rendering service in the transportation of property in interstate commerce, and has leased thirty-two pieces (32) of motor equipment which he also operates in rendering service in the transportation of property between the States of Illinois, Missouri, Kansas, and Iowa.

## VI

These Defendants answering the sixth paragraph of the Bill say they have no information sufficient to form a belief as to the allegations therein contained and therefore deny plaintiff has invested large sums of money in motor vehicles, trucks, tractors and semi-trailers, and in terminal facilities: that he has established regular and convenient routes of travel for said motor vehicles between the terminals alleged in the Bill; that he maintains at said terminals agents and

employees for receiving, checking, billing, and forwarding property for transportation; that he maintains proper and sufficient motor equipment, commonly known as road trucks, for the transportation of property between terminals, and provides and maintains at said terminals motor vehicles for rendering pick-up and delivery service between his terminals and consignors and consignees, as set out in the sixth paragraph of the Bill; specifically deny that he maintains said motor vehicles, both highway and terminal motor vehicles, as set out in plaintiff's tariff now on file with the Interstate Commerce Commission, as alleged in the sixth paragraph of the Bill.

## VII

These Defendants further answering state they have no information sufficient to form a belief as to the allegations contained in the seventh paragraph of the Bill and therefore deny that plaintiff assembles at his terminals large numbers of shipments through the use of his pick-up equipment, [fol. 15] which shipments are then loaded into the motor vehicles commonly known as road trucks and transported by said road trucks to the terminal to which the shipments are destined, and are there transferred to the dock and reloaded into the various delivery trucks to be delivered to the various consignees in the commercial areas, as alleged in plaintiff's Bill. Specifically aver the fact to be that these Defendants that plaintiff operates in the prosecution of his business a terminal building located at Shawnee and Adams Streets in Kansas City, Kansas, as alleged in the fifth paragraph and referred to in the seventh paragraph of the Bill, but avers the fact to be that plaintiff does not operate a terminal building at Shawnee and Adams Streets, Kansas City, Kansas and does not own and operate pick-up equipment at said terminal *at said terminal* through which he assembles large numbers of shipments, which shipments are then loaded into motor vehicles commonly known as road trucks and transported by said road trucks to the terminal to which said shipments are destined, as alleged in the seventh paragraph and referred to in the fifth paragraph of the Bill.

## VIII

These Defendants further answering state they admit the Seventy-Fourth Congress of the United States passed an Act, approved August 9, 1935, known as "Motor Carrier

Act, 1935." Admit that by said Act the Interstate Commerce Commission was given exclusive jurisdiction to grant certificates of convenience and necessity to common carriers by motor vehicles in interstate commerce, to regulate rates and service of said carriers in interstate commerce. Further answering, these Defendants say they have no information upon which to form a belief as to whether plaintiff in conformity to said Motor Carrier Act of 1935 has filed with the Interstate Commerce Commission an application on Form BMC 1, as provided by said Interstate Commerce Commission, said application being Docket No. MC-61959, and has filed with the Interstate Commerce Commission a [fol. 16] schedule of rates for said transportation, and, therefore, deny that plaintiff in conformity to said Motor Carrier Act of 1935 has filed with the Interstate Commerce Commission an application on Form BMC 1, as provided by said Interstate Commerce Commission, said application being Docket No. MC-61959; deny that plaintiff filed with the Interstate Commerce Commission a schedule of rates for interstate transportation, and specifically deny that plaintiff has complied with all requirements of said Motor Carrier Act of 1935 and the orders of the Interstate Commerce Commission, as alleged in the eighth paragraph of the Bill.

## IX

Answering the allegations in the ninth paragraph of the Bill, these Defendants admit that on November 23, 1934 the Public Service Commission of Missouri issued to plaintiff an Interstate Permit No. T-3734; admit that plaintiff filed with the Public Service Commission insurance policies and paid license fees and taxes, as required by the Public Service Commission Law of Missouri, for the transportation of property for hire over the highways of the State of Missouri for interstate movements and in interstate commerce only. Further answering, these Defendants specifically deny that plaintiff has fully complied in all respects with the laws of the State of Missouri and the orders of the Public Service Commission of Missouri.

Further answering, these Defendants admit that on July 22, 1936 the Public Service Commission instituted a proceeding to revoke the authority of Frank Eicholz, doing business as Riteway Motor Service, and holder of Interstate Permit No. T-3734 theretofore issued by the Public Service Commission of Missouri, said proceedings being docketed as

Case No. T-5330; admit that on December 10, 1936 the Commission issued its order in Case T-5330 and revoked the permit and authority of plaintiff to operate in interstate commerce as a freight-carrying motor carrier over the highways [fol. 17] of Missouri; admit that by subsequent order of said Public Service Commission the effective date of its order of December 10, 1936 was extended to December 30, 1936.

## X

These Defendants further answering: ate they admit that on December 16, 1936 plaintiff filed with the Public Service Commission of Missouri an application for rehearing in said Case T-5330; that on December 23, 1936 defendant Commission issued its order overruling said application for rehearing. These Defendants specifically deny that under the decisions of the Court of Appeals and the Supreme Court of Missouri no appeal can be taken to the courts of last resort in the State from this order of the Public Service Commission.

Further answering, these Defendants deny that the action of defendant Public Service Commission in issuing its said order of December 10, 1936 was unlawful, unreasonable, arbitrary and capricious; deny that the Public Service Commission of Missouri attempted to exercise power and authority expressly delegated by the Congress of the United States to the Interstate Commerce Commission.

These Defendants further answering deny that said order of defendant Public Service Commission, issued on December 10, 1936, is or was a direct burden and interference with interstate commerce and deprives plaintiff of his right to engage in interstate commerce; deny that the public is deprived of the use of plaintiff's facilities in the transportation of property in interstate commerce.

## XI

Answering the eleventh paragraph of the Bill these Defendants specifically deny that their assumption of authority was unwarranted and illegal which they asserted in issuing the order of December 10, 1936, deny that these Defendants [fol. 18] are threatening to arrest the drivers of said plaintiff's vehicles, thereby destroying the business of plaintiff; deny they have any intention or power to cause the arrest of plaintiff under the laws of the State of Missouri; deny that

they are threatening or attempting to cause the filing of informations purporting to charge plaintiff with violations of law which will work irreparable injury and damage to plaintiff's property and cause irreparable damage to the public who are dependent on plaintiff for the transportation by plaintiff of their property.

Further answering, these Defendants deny that the order of these Defendants of December 10, 1936 is contrary to and in violation of the Motor Carrier Act of 1935; deny that said order of December 10, 1936 is in violation of Article 3 of the Constitution of Missouri; specifically deny that said order of the Public Service Commission of December 10, 1936 was or is in violation of Sections 1, 24 and 25 of Article 4 of the Constitution of Missouri; deny that plaintiff was without adequate remedy at law; deny that the acts of the Public Service Commission complained of in the Bill are illegal, without warrant and in direct interference with interstate commerce; deny that said actions invade the rights of plaintiff and deprive plaintiff of his liberty and property without due process of law in contravention of that part of Section 1 of Article 14 of the Constitution of the United States which provides as follows:

"No state shall make or enforce any laws which shall abridge the privilege or immunities of a citizen of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws."

Further answering, these Defendants deny that said order of defendant Commission of December 10, 1936 was and is in violation of Section 8 of Article 1 of the Constitution of the United States.

[fol. 19]

## XII

Further answering, these Defendants state that they deny that unless the defendants in this cause are restrained and enjoined from arresting and filing criminal charges against and prosecuting plaintiff, his drivers and employees, plaintiff will be required to defend a multiplicity of criminal actions; deny that plaintiff's property and business will be destroyed; specifically deny that plaintiff has no other adequate remedy at law.

### Affirmative Defense

Further answering, these Defendants, still admitting and alleging all matters and things hereinbefore specifically admitted or alleged, state that the Public Service Commission of the State of Missouri was created and exists under and by virtue of the laws of the State of Missouri known as the Public Service Commission Law (R. S. Mo. 1929, Chap. 33, Sec. 5121, et seq.) and that under Article 8, Chap. 33, R. S. Mo. 1929, as amended by Laws of 1931, said Commission is vested with authority to supervise and regulate the operation of motor carriers in the transportation of passengers and property by motor vehicles in the State of Missouri, known as the Missouri Bus and Truck Law; that Section 1, Laws of Missouri 1933, page 359, provides:

"It is hereby declared unlawful for any person, firm, copartnership, association or corporation, to sell or offer for sale any ticket or tickets calling for transportation or contract for transportation in any manner on any motor carrier, unless the owner or operator of said motor carrier has obtained from the Public Service Commission of the State of Missouri a certificate of convenience and necessity or interstate permit authorizing such motor carrier owner or operator to render the transportation service called for by said ticket, and unless said motor carrier has been licensed and the tax paid thereon as required by Article 8, Chapter 33, Revised Statutes of Missouri, as amended by Laws of 1931, pages 304 to 316, both inclusive."

[fol. 20]

### II

These Defendants allege that plaintiff procured from the Public Service Commission of the State of Missouri an interstate permit No. T-3734 authorizing plaintiff to engage in interstate business only; that under the terms of Section 5268, R. S. Mo. 1929, paragraph (a): "It is hereby declared unlawful for any motor carrier to operate or furnish service as a common carrier within this state without first having obtained from the commission a certificate declaring that public convenience and necessity will be promoted by such operation." Defendants further allege that plaintiff was not the holder of a certificate of convenience and necessity authorizing him to engage in intrastate commerce.

## III

These Defendants further allege that under the terms of Section 5267, R. S. Mo. 1929, paragraph (b): "The Public Service Commission shall have power and authority by general order or otherwise to prescribe rules and regulations governing all motor carriers as herein defined;" that under and pursuant to said section the Public Service Commission made and promulgated Rule No. 44, which rule provides:

"No driver or operator operating under an interstate permit shall accept for transportation within this state any person or property known to be destined to a point within the State of Missouri. If such interstate carrier . . . accepts within Missouri property destined to a point beyond the limits of the State of Missouri such property shall not be terminated within the State of Missouri."

## IV

These Defendants further allege that plaintiff, in violation of Section 5268, paragraph (a), Laws of Missouri 1933, page 359, Section 1, and Rule No. 44 made and promulgated as aforesaid, did engage in intrastate business within the State of Missouri, in that plaintiff did accept for transportation and did transport property under said interstate permit from points within the State of Missouri to points within the State of Missouri.

[fol. 21]

## V

These Defendants further allege that after complaints came to the Public Service Commission of the State of Missouri relating to the practices of plaintiff herein, the Commission ordered an investigation and set the matter down for hearing; that after a hearing at which plaintiff was represented by counsel and was present, the Public Service Commission of the State of Missouri issued its report and order of December 10, 1936, revoking plaintiff's permit, for the reasons set forth therein, certified copy of which is hereto attached and marked Exhibit A and by reference made part of this answer.

These Defendants further allege that on December 16, 1936 plaintiff filed a motion for rehearing and the effective date of said order revoking the permit of plaintiff was ex-

tended to December 30, 1936. These Defendants further allege that thereafter on December 23, 1936 defendant Commission issued a supplemental report and order overruling and denying plaintiff's motion for rehearing for the reasons set forth therein. Certified copy of said report and order is attached hereto, marked Exhibit B, and by reference made part of this answer.

## VI

These Defendants further allege that plaintiff has a complete and adequate remedy at law, in that plaintiff is afforded a speedy, preferential and complete remedy by the laws of the State of Missouri and in this connection Defendants rely upon the following statutes:

(a) Section 5234, R. S. Mo. 1929, among other things, provides in the following language, that any party aggrieved by an order of the Public Service Commission may, as a matter of right, review said order in the circuit courts of the State of Missouri within the judicial circuit of any circuit court of any county wherein the hearing is had, which said section reads:

[fol. 22] "Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the rendition of the decision on rehearing, the applicant may apply to the circuit court of the county where the hearing was held or in which the commission has its principal office for a writ of certiorari or review (hereinafter referred to as a writ of review) for the purpose of having the reasonableness or lawfulness of the original order or decision or the order or decision on rehearing inquired into or determined. The applicant, at the time of applying for such writ of certiorari or review, shall deposit with the clerk of the circuit court to which such application is made the sum of twenty-five dollars, which shall be paid by said clerk to the judge of said circuit court, after a hearing had or upon the final disposition of such cause in said court. Such writ shall be made returnable not later than thirty days after the date of the issuance thereof, and shall direct the commission to certify its record in the case to the court. On the return day the cause shall be heard by the circuit court, unless for a good cause shown the same be continued. \* \* \*

No court of this state, except the circuit courts to the extent herein specified and the supreme court on appeal, shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the executing or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties. The circuit courts of the state shall always be deemed open for the trial of suits brought to review the orders and decisions of the commission, as provided in this act and the same shall be tried and determined as suits in equity."

(b) Section 5235, R. S. Mo. 1929, among other things, provides in the following language for a stay or suspension by the circuit court of an order or decision of the Commission:

"The pendency of a writ of review shall not of itself stay or suspend the operation of the order or decision of the commission, but during the pendency of such writ, the circuit court in its discretion may stay or suspend, in whole or in part, the operation of the commission's order or decision. No order so staying or suspending an order of the commission shall be made by any circuit court otherwise than on three days' notice and after hearing, and if the order or decision of the commission is suspended the same shall contain a specific finding based upon evidence submitted to the court and identified by reference thereto, that great or irreparable damage would otherwise result to the petitioner and specifying the nature of the damage. In case the order or decision of the commission is stayed or suspended, the order or judgment of the court shall not become effective until a suspending bond shall first have been executed and filed with, and approved by the circuit court, payable to the State of Missouri, and sufficient in amount and security to secure the prompt payment, by the party petitioning for the review, of all damages caused by the delay in the enforcement of the order or decision of the commission, and of all moneys which any person or corporation may be compelled to pay, pending the review proceedings, for transportation, transmission, product, commodity or service in excess of the charges fixed by the order or decision of the commission, in case such order or decision is sustained."

[fol. 23] (c) Section 5236, R. S. Mo. 1929, among other things, provides for preference in the trial in circuit court:

“All actions or proceedings under this or any other act, and all actions and proceedings commenced or prosecuted by order of the commission, and all actions and proceedings to which the commission or the state may be parties, and in which any question arises under this or any other act, or under or concerning any order or decision or action of the commission, shall be preferred over all other civil causes except election contests in all the circuit courts of the State of Missouri, and shall be heard and determined in preference to all other civil business pending therein except election contests, irrespective of position on the calendar.”

(d) Section 5237, R. S. Mo. 1929, among other things, provides in the following language for the appeal to the Supreme Court, as a matter of right and preference, and for the discretionary suspension of the judgment of the circuit court pending such appeal:

“The commission, any corporation, public utility or person or any complainant may after the entry of judgment in the circuit court in any action in review, prosecute an appeal to the supreme court of this state. Such appeal shall be prosecuted as appeals from judgment of the circuit court in civil cases except as otherwise provided in this act (article). The original transcript of the record and testimony and exhibits, certified to by the commission and filed in the circuit court in any action to review an order or decision of the commission, together with a transcript of the proceedings in the circuit court, shall constitute the record on appeal to the supreme court. Where an appeal is taken to the supreme court the cause shall, on the return of the papers to the supreme court, be immediately placed on the docket of the then pending term by the clerk of said court and shall be assigned and brought to a hearing in the same manner as other causes on the then pending term docket, but shall have precedence over all civil causes of a different nature pending in said court. No appeal shall be effective when taken by a corporation, person or public utility unless a cost bond of appeal in the sum of five hundred dollars shall be filed within ten days after the entry of judgment in the circuit court appealed from. The circuit court may in its discretion suspend its judgment pending the hearing

in the supreme court on appeal, upon the filing of a bond by such corporation, person or public utility with good and sufficient security conditioned as provided for bonds upon actions for review and by further complying with all terms and conditions of this act (law) for the suspension of any order or decision of the commission pending the hearing of review in the circuit court."

These Defendants allege that in view of the above statutory provisions of the State of Missouri providing for speedy, adequate and complete and even preferential remedy, this Court on principles of comity should not entertain this suit for injunctive relief.

[fol. 24] Wherefore, these Defendants pray that the temporary restraining order be set aside, that the Bill be dismissed and that the prayer for relief be denied and for all other further and general orders and decrees that may be found proper in the premises.

Public Service Commission of Missouri, by James P. Boyd, General Counsel; Daniel C. Rogers, Assistant Counsel, Solicitors.

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[fol 25]                      EXHIBIT "A" TO ANSWER

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF  
MISSOURI

Case No. T-5330

Proceeding to Revoke the Authority of Frank Eichholz, Doing Business as Riteway Motor Service, Holder of Interstate Permit No. T-3734 and a Citation to Said Frank Eichholz to Show Cause if Any He Has Why His Permit to Operate Interstate as a Motor Carrier of Freight Should Not be Revoked

### Report and Order

This proceeding was instituted by an order of the Commission directing that a hearing be held and an investigation made concerning the nature and conduct of the business of Frank Eichholz as a motor carrier, and to determine particularly whether or not he has engaged unlawfully in intrastate commerce and in what manner he has vio-

lated the law or the rules and regulations of the Commission applicable to his business, and whether or not his present permit as an interstate motor carrier of freight should be revoked.

Pursuant to that order and upon notice duly served a hearing was conducted before a member of the Commission at its office in Jefferson City, Missouri, August 17 and 18, 1936, at which time and place respondent appeared in person and by counsel and appearances were also entered on behalf of other motor and rail carriers by the Hon. John D. Taylor, Hon. Nick Cave, Hon. M. E. Casey, Mr. George Aylward, Mr. J. R. Rose, Mr. Joe H. Miller and Mr. R. W. Hedrick.

The evidence consists of the oral testimony of eighteen witnesses, numerous exhibits comprising bills of lading, freight bills, orders for merchandise, tariff schedule, and other documentary evidence together with admissions and agreed statements of fact.

[fol. 26] By uncontradicted proof and by admissions it was shown that respondent is the holder of an interstate Permit No. T-3734 issued by this Commission, authorizing him to operate as a motor carrier of freight in interstate commerce exclusively; that he has no authority to operate as an intrastate carrier; that he receives and transports freight from shippers in St. Louis, Missouri, destined to consignees in Kansas City, Missouri, and receives and transports freight from shippers in Kansas City, Missouri, destined to consignees in St. Louis, Missouri; that in transporting such freight it is moved through a terminal located across the state line in Kansas City, Kansas, known as the Mid-Central Terminal; and he assumes full responsibility for the entire transportation from consignor to consignee. In receiving goods at St. Louis, Missouri, destined for Kansas City, Missouri, it is sometimes picked up at the shippers dock by the carrier's own vehicles and sometimes it is transported to the St. Louis terminal by other pick-up carriers who move it at the cost of the carrier. Such shipments are then carried over U. S. Highway No. 40 to Kansas City, Missouri, through Kansas City, Missouri, to the carrier's terminal in Kansas City, Kansas, located at Shawnee and Adams Streets where it is unloaded, and thence conveyed back to Kansas City, Missouri, to the consignee through arrangement existing between Eichholz and the terminal operator. The terminal operator procures trucks

for such delivery at the cost of Eichholz. Shipments received at Kansas City, Missouri, destined to consignees at St. Louis, Missouri, are collected in behalf of Eichholz by the terminal operator in Kansas City, Kansas, or in some instances shippers in Kansas City, Missouri, make their own delivery to the terminal in Kansas City, Kansas, and receive therefor a reduction of 5¢ per hundred weight below the quoted tariff. The Mid-Central Terminal is owned and operated by R. H. Straight, who has no authority to trans-[fol. 27] port goods by motor cars into the State of Missouri. It is agreed that the respondent has filed an application with the Interstate Commerce Commission for a certificate under the grandfather clause as provided in the Federal Motor Carrier Act, 1935. A copy of this application was offered in evidence. Eichholz has filed with the Interstate Commerce Commission on a motor freight tariff designated M. F.-1 C. C. No. in which a rate is quoted from St. Louis, Missouri, to Kansas City, Missouri. His chief office and place of business is at 513 South Second Street, St. Louis, Missouri. He does not maintain any office, depot or terminal in Kansas City, Missouri, and has never done so but in his operation he has always utilized the Mid-Central Terminal in Kansas City, Kansas. The present relationship between the Mid-Central Terminal and Frank Eichholz in the use of the terminal at Shawnee and Adams Streets, Kansas, has existed for approximately three years.

The testimony is voluminous and to a large extent cumulative. It shows an industrious solicitation on behalf of Eichholz for the transportation of freight from Kansas City, Missouri, to St. Louis, Missouri, and from St. Louis, Missouri, to Kansas City, Missouri, on the basis of his quoted interstate rate between such cities as exemplified in his tariff filed with the Interstate Commerce Commission. This rate is much lower than the established rate for intrastate carriers operating between such cities. By such means a large volume of business was developed, some shippers making daily deliveries to this carrier. They were induced to use his service mainly by the lower freight rate available. Some of such shippers were informed and knew that their shipments were to pass through the Kansas Terminal in transit; others did not know it and were not aware of the course of the traffic, and never heard of the Mid-Central Terminal in Kansas having anything to do with the transportation.

[fol. 28] It is deemed unnecessary and impracticable to set out all of the testimony of the various witnesses. Reference will be made to specific witnesses whose testimony may be regarded as typical of the testimony of others and with special reference to the bearing which it may have upon the question of the character of commerce in which respondent has engaged.

The deposition of R. H. Straight, owner and operator of the Mid-Central Terminal at Kansas City, Kansas, was obtained and received in evidence. His testimony covers the relationship existing between him and Frank Eichholz operating under the name of the Riteway Motor Service and describes the service which he renders to Eichholz in connection with the transportation of property between Kansas City, Missouri, and St. Louis, Missouri, and other operations conducted by Eichholz as a motor carrier. He was asked to describe how freight was handled which originated in Kansas City, Missouri, destined to consignees in St. Louis, Missouri. He said that shippers in Kansas City, Missouri, would call the Mid-Central Terminal Company for a pick up of merchandise and the pick-up drivers of the Mid-Central Terminal would make the pick up; that the bill of lading was made out to the Mid-Central Terminal, Kansas City, Kansas, sometimes marked in care of the Riteway and sometimes not; that the shipment was brought to the terminal and then rebilled "showing the Mid-Central Terminal of Kansas City, Kansas, as shipper consigned to the consignee in St. Louis, Missouri." He considered the merchandise in his care until turned over to the Riteway. He employed the pick-up drivers. Such bill of lading shows, at the time it is signed by the pick-up driver, that the shipment is destined to St. Louis, Missouri. Quantity or truck load shipments are handled in the same manner as l. c. l. shipments. The trucks of the Riteway do not go into Kansas City, Missouri, to pick up a full truck load of merchandise destined for St. Louis and take it through the terminal for rebilling. Eichholz has been operating the Riteway Motor Service in and out of this terminal for about five years and during that time shipments between Kansas City, Missouri, and St. Louis, Missouri, have been handled in practically the same manner, but there was some change in the Spring of 1936 in several matters of office routine and detail; that he made collection of all freight that goes

through the terminal from St. Louis to Kansas City and in estimating the amount use is made of the Riteway tariff. The Riteway pays the terminal operator for all terminal service and all other service rendered in connection with the pick up and delivery of shipments carried by the Riteway. No collection for his service is made from any consignee or shipper whose freight is handled by Eichholz but he receives all his compensation from Eichholz. Prior to April 1936 there was a different arrangement and something in addition to the freight rate between St. Louis, Missouri, and Kansas City, Missouri, was collected from consignees. Service rendered in connection with shipments from St. Louis to Kansas City, Missouri, are paid for in the same manner. Witness stated that on shipments from St. Louis, Missouri, to Kansas City, Missouri, that he received a communication from shippers on every shipment generally consisting of bills of lading directing him what disposition to make of the property; that such bills of lading covered the movement of the merchandise from Kansas City, Kansas, to Kansas City, Missouri, and when these bills of lading are signed by the consignee showing receipt of the goods that they are returned to the shipper in St. Louis. As a rule such bills are mailed except in unusual circumstances. When speedy delivery is necessary the bill of lading will be sent along with the Riteway truck in a sealed envelope. The Riteway brings considerable freight to the terminal which is destined to points other than Kansas City, Missouri. He receives no bill of lading for forwarding freight destined to points in states other than Missouri. He was asked what he did with the freight bills on shipments originating in [fol. 30] St. Louis, Missouri, destined to consignees in Kansas City, Missouri. He said "I think I can answer that best by saying as putting ourselves in the position of a consignee as far as the Riteway Motor Service goes. We signed one bill as received and keep one copy here, the consignees copy for our files." The name of the consignee in Kansas City, Missouri, appears on the freight bills in some instances. They are designated in care of the Mid-Central Terminal Kansas City, Kansas. In other instances there is no name of a consignee in Kansas City, Missouri, given and reliance is placed upon the bills of lading which are mailed to the Mid-Central Terminal from St. Louis for billing instructions between the terminal and the consignee in Kansas

City, Missouri. The freight rate on billings issued by the terminal are the same as that shown on the original Riteway billing from St. Louis, Missouri, to Kansas City, Kansas, and this is the same as the interstate freight rate charged by the Riteway between St. Louis, Missouri, and Kansas City, Missouri, via the terminal in Kansas City, Kansas. Practically all shipments originating in Kansas City, Missouri, destined to St. Louis, Missouri, moving through the Kansas terminal are brought there through the solicitation of agents for Eichholz. A Mr. Barrett solicits in Kansas City, Missouri, and a Mr. Miller in St. Louis, Missouri, for the movement of freight by Eichholz between the two points through the Kansas terminal. Witness claimed that he did not know that the interstate rate afforded by Eichholz was lower than the established intrastate rate. He was questioned in reference to numerous movements of freight from St. Louis, Missouri, destined to consignees in Kansas City, Missouri, and North Kansas City, Missouri, and how they were handled through the Kansas terminal. Such shipments were received at the terminal and according to the witness in every instance rebilled from the terminal to the consignee in Missouri and the property delivered by the employees of the terminal company and the terminal company received its compensation for all terminal service and delivery service from Eichholz.

[fol. 31] Mr. Baumgartner of St. Louis, Missouri, testified that he is the traffic manager for the H & K Coffee & Spice Company. He produced bills of lading and other documents from the files of the Company having reference to transactions with the Riteway Motor Service. His evidence discloses that the company upon request for merchandise by its representative at Kansas City, Missouri, routed various shipments and issued its bills of lading for the transportation of goods via Riteway from St. Louis, Missouri, to its agent A. Baill in Kansas City, Missouri; that the goods were carried by Eichholz through the terminal in Kansas City, Kansas, and delivered to the consignee in Kansas City, Missouri. The goods were picked up by Eichholz in St. Louis and he was informed by the agent of the Riteway that the property would move through the Kansas City, Kansas Terminal. The Riteway made the pick up in St. Louis; that frequent shipments were made that way and that the lower rate for transportation was the reason for delivering the property to Eichholz for transportation and that he does

practically all of such hauling for the company; that no bill of lading was mailed to the Mid-Central Terminal in Kansas, and that there was no communication whatever with the terminal; that disposition was always made according to the bills of lading. The bill of lading shows Kansas City, Missouri, as the destination. The freight bills shows the destination to be in care of the Mid-Central Terminal, Kansas City, Kansas, but does not show the destination of the shipments. There is no rebilling of the goods at Kansas City, Kansas, so far as witness knew. The shipments are billed to Kansas City, Missouri. All packages of such shipments were marked "A. Baill, % H. & K. Warehouse, Kansas City, Missouri." When the property was delivered for transportation the agent of Eichholz placed a rubber stamp on the bill of lading containing the following words: "Riteway Motor Service via Kansas City, [fol. 32] Kansas" and the pick-up agent or employee would sign his name or initials under such stamp as the receipt for the goods. Such shipments have been made for a period of probably six months. The agent of the Riteway pointed out and emphasized the cheaper freight service afforded by this carrier by moving freight in the manner described. He had not noticed the wording of the rubber stamp on the bill of lading until called to this attention by an agent of the Bus and Truck department and stated that he did not care whether it was on there or not, and that all he cared for was getting a receipt for the shipment.

Mr. Schmidt of St. Louis, Missouri, testified that he is traffic manager and shipping clerk for the Alligator Oil Clothing Company; that he handles bills of lading and gives shipping instructions for the company. He presented certain exhibits showing consignment of goods from his company in St. Louis to Wolff Bros. Inc., Kansas City, Missouri, for transportation by the Riteway Motor Service. He did not know that such shipment was to go through Kansas City, Kansas. There was no contact with the Kansas City, Kansas, Terminal. The bill of lading called for transportation to Kansas City, Missouri. Witness had never seen the Riteway rubber stamp. There had been solicitation for business. He did not know how the shipments reached the consignee in Kansas City, Missouri, and at the time he was testifying was the first that he had learned that the shipment was carried through Kansas City, Kansas. The packages were stencilled "Wolff Bros. Kansas City, Missouri."

Miss H. Frank, an employee of the Perfection Manufacturing Company of St. Louis testified to shipments made by that company to the Western Auto Supply Company, Kansas City, Missouri. The shipment was routed on customer's order over the Riteway. Witness did not know that the shipment was to move through Kansas City, Kansas. [fol. 33] A copy of the bill of lading was sent to the customer and there was no contact with the Mid-Central Terminal in Kansas City, Kansas. Other witnesses testified to a similar state of facts.

Mrs. Turpin, Assistant Secretary of the Neevel Manufacturing Company of Kansas City, Missouri, testified that her company made 35 or 40 shipments per month from Kansas City, Missouri, to consignees in St. Louis, Missouri, and to other places in the State. Documents were presented showing bills of lading for goods consigned to S. S. Kresge Company, St. Louis, Missouri, and to Graver's Department Stores at Cardwell and Sikeston, Missouri, and to the Brown Shoe Company, St. Louis, Missouri. According to these bills of lading the shipments were routed in these words: "Route Mid-Central Terminal via Riteway", and the shipments to Graver's Department Stores were routed "Riteway to St. Louis % F & F Truck Company, 631 South Broadway, St. Louis, Missouri." Witness testified that the shipments were routed to "our best advantage"; that the designation was "Mid-Central Terminal via Riteway". The Mid-Central made the pick up. Mr. Barrett had solicited for the Riteway and showed witness how money could be saved by shipping through the Riteway. The intrastate rates were much higher than the interstate rate quoted by Eichholz. Connection with the Company began four or five months ago. The cartons containing the merchandise were marked with the name of the consignee at St. Louis, Missouri. The plant of this company is located on the east side of Kansas City, Missouri, and 10 or 12 miles from the terminal in Kansas City, Kansas.

Miss Irene Schmitz testified that she is the traffic manager for the Pen-Jel Corporation of Kansas City, Missouri; that upon solicitation by the agent of the Riteway shipments were made from Kansas City, Missouri, to the company's broker in St. Louis, Missouri, and she was informed that the Mid-Central Terminal would pick up the shipments for Eichholz.

[fol. 34] Mr. L. L. Morgan testified that he was in charge of traffic for the Puritan Compressed Gas Corporation with plant located in North Kansas City, Missouri; that he had been solicited by Barrett and the Mid-Central for shipments over the Riteway and he designated various shipments which were made back and forth from St. Louis, Missouri, to North Kansas City through Eichholz's service. He was informed to call the Mid-Central Terminal for pick-up service. The routing was designated as "Mid-Central Terminal via Riteway". The labels on the packages were "Puritan Compressed Gas Corporation" with the St. Louis address. The shipments were between the company and its agent or branch office in St. Louis. He had been shown the tariff of the Riteway Company filed with the Interstate Commerce Commission and the rates paid for the shipments made were those specified in that tariff.

Mr. Denebein was in charge of shipments for the Waxide Paper Company of St. Louis and made shipments nearly every day over the Riteway. The receipt on the bills of lading read "Riteway Motor Service via Kansas City, Kansas, Les H". Witness did not know that this stamp was on the bills of lading or the wording of it until it was called to his attention, although he knew that the shipments from St. Louis, Missouri, to Kansas City, Missouri, went through Kansas City, Kansas. All packages were stencilled with the consignee's name and address. Formerly the practice had been to issue two sets of bills of lading, one evidencing a contract of transportation from St. Louis to Kansas City, Kansas, and another from the Mid-Central Terminal to Kansas City, Missouri. This was done with a view of conformity to an interstate transaction. This practice, however, was discontinued upon information received by telephone that it was no longer necessary. This witness also testified that there had never been any contact whatsoever with the Mid-Central Terminal in Kansas City, Kansas, with reference to these shipments.

[fol. 35] Mr. Baisile in charge of the Traffic Department of the American Beauty Macaroni Company of Kansas City, Missouri, testified to shipments by that company to its own plant in St. Louis, Missouri, using the Riteway service. He testified that the company transported its own goods from Kansas City, Missouri, to the Mid-Central Terminal in Kansas City, Kansas, and was allowed 5¢ per hun-

dred on its freight bill. The company had been solicited for such movement of freight by Barrett. Witness also testified that his company in making a shipment from Kansas City, Missouri, to Wichita, Kansas, did not haul such shipments from its plant to the Mid-Central Terminal "because it is an interstate shipment. We don't have to do it."

Mr. Mueller in charge of Traffic for the Federated Metals Corporation of St. Louis, Missouri, testified to the movement of property for that company by the Riteway Service to the Western Newspaper Union at Kansas City, Missouri, and to other shipments between said cities; that such shipments have been made since the first of April and since the filing of the Eichholz tariff with the Interstate Commerce Commission. The tariff had been submitted to him and inquiry was made of the method of handling shipments under said interstate rates. It was explained to the witness that the property would be loaded on trucks in St. Louis and handled through the Mid-Central Terminal in Kansas City, Kansas, and then delivered to a truck line or local drayage concern and delivered back from Kansas City, Kansas, to consignees in Kansas City, Missouri. The witness was doubtful about the propriety of such operation but was eventually instructed by his superiors to use the service. The tariff rate was lower than other rates. There was no contact made by witness or his company with the Mid-Central Terminal and no instructions were issued to it. The packages in such shipments were marked from the company to its consignee in Kansas City, Missouri. The intrastate rates were too high to meet competition from East St. Louis.

[fol. 36] Many other witnesses testified in a similar manner and Mr. Eichholz was eventually called by counsel for the Commission and stated that he assumed responsibility for delivery between St. Louis, Mo., and Kansas City, Mo. and that he paid Mr. Straight of the Mid-Central Terminal for all service rendered by him.

Over objection of counsel for respondent there was offered and received in evidence General Order No. 27 of the Public Service Commission as amended. It included Rule Numbered 44 which was admitted in evidence.

At the conclusion of evidence offered in behalf of the Commission counsel for respondent stated that he would

rest the case on the facts before the Commission and no further evidence was offered or received on behalf of respondent.

From the declared objects of the investigation briefs of counsel and the evidence it is apparent that the controlling question for determination is the character of commerce in which respondent engaged while transporting property as a motor carrier for hire from consignors in Kansas City, Missouri, to consignees in St. Louis, Missouri, and other Missouri points, and from consignors in St. Louis, Missouri, to consignees in Kansas City, Missouri. This question must be determined by a consideration of all relevant facts and upon such consideration we are of the opinion and find from the evidence that such commerce was intrastate in character; that respondent has solicited and engaged in such business under the pretense of transacting interstate business; that he has resorted to shams, devices and subterfuges which merely give the color of interstate commerce to his transactions; that he has unlawfully sought thereby to exercise valuable rights and privileges never acquired and to evade regulation by the State of Missouri. For these findings and conclusions we rely upon the admitted facts, the uncontradicted evidence above recited and the law applicable to the case.

[fol. 37] With the exception of the testimony of the Kansas terminal operator there is no conflict in the evidence. His testimony to the effect that there were two separate and distinct movements in the transportation of property from St. Louis, Missouri, first to Kansas City, Kansas, on a separate bill of lading, and another shipment on another bill of lading, and under instructions from the shipper, from Kansas City, Kansas, to the consignee in Kansas City, Missouri, is completely overthrown by the documentary evidence and by the testimony of numerous witnesses. We accord no weight to his evidence on this subject and give it no credence whatever other than to draw the justifiable inferences that he was aware of and a willing participant in the scheme of Eichholz to camouflage the true character of the business in which Eichholz was engaged. The bills of lading in evidence show contracts of through shipment from consignors to consignees all in the State of Missouri. The entire transportation was conducted by Eichholz and responsibility therefor is clearly shown and admitted. Eich-

holz is authorized to operate as a freight-carrying motor carrier from all points in Missouri to points beyond the State and from points beyond Missouri to all points within the State in interstate commerce exclusively, and such operation is authorized over an irregular route. The use of the state highways is at his disposal for the conduct of legitimate business. There is direct connection by improved highways between St. Louis and Kansas City, Missouri, and in order to reach Kansas City, Kansas, the highways over which one would travel and the ones actually used by Eichholz pass through Kansas City, Missouri. Property conveyed by Eichholz from St. Louis, Missouri, was transported many miles beyond the location of consignees in Kansas City, Missouri, and in North Kansas City, Mo., in order to reach the Kansas terminal and thence reconveyed many miles to the consignees location in Missouri. In one instance at least the consignee was located on the east side [fol. 38] of Kansas City ten or twelve miles from the terminal in Kansas, and we know as a matter of common knowledge that such a method of transportation is wholly unnecessary, uneconomical and a plain diversion from the normal path of transportation from consignor to consignee. A motor carrier cannot voluntarily convert intrastate commerce into interstate commerce merely by crossing a state line when it would be contrary to convenience, necessity and advantage to do so. When Eichholz indulged in such practices he was seeking and obtained an unlawful advantage over intrastate operators and caused an unnecessary diversion of shipments carried by him so that they would cross a state line in transit to the consignees. Such a practice is a plain subterfuge and a fraud. Facts overturn fiction.

Respondent is authorized to engage in interstate commerce exclusively and has no authority to operate intrastate as a motor carrier and when he did so engage his operation was in violation of the Missouri Bus and Truck Law Section 5268 R. S. Mo. 1929 and Rule No. 44 of this Commission which prohibits a motor carrier operating under an interstate permit to accept for transportation within this state any property known to be destined to a point within the state.

Counsel for respondent strenuously contends that the business so conducted by Eichholz was regular, legitimate, and in all respects interstate commerce over which this

Commission has no jurisdiction; that since the passage of the Federal Motor Carrier Act of 1935 interstate carriers are under the exclusive jurisdiction of the Interstate Commerce Commission. It is admitted that the regulation of intrastate commerce is left to the State Commissions but it is insisted that Congress has defined the term interstate commerce to mean "commerce between any place in a state and any place in another state or between places in the same state through another state whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express or water." In the argument relied upon is placed upon this definition to characterize the business of Eichholz as interstate commerce, and it is insisted that the motive or reason for his operations across a state line through another state in the transportation of property from consignors to consignees within the state of Missouri is wholly immaterial and does not in any manner affect the character of the commerce in which the carrier was engaged, but the true character of the commerce is to be determined by the route and the fact that it did cross a state line. We think counsel is in error and we do not agree to any such interpretation of the Act of Congress or the effect upon the character of commerce when it is intentionally caused to be diverted over an unreasonable and unnecessary route in order to cross a state line and thereby acquire the false color of interstate commerce. Congress never intended to permit or assist the perpetration of a fraud or abridge the right of a state to prevent fraud against it, and in defining interstate commerce as that between places in the same state through another state the Congress evidently had in mind a normally established interstate route and connecting routes reasonably called for by convenience, necessity and benefit. Fictitious routes and false motives are equally immaterial and ineffective in the presence of facts showing things actually done by a carrier according to the known intention of a shipper. Such facts determine the character of commerce involved.

Reliance is also placed upon telegraph and railroad cases in which it was held that messages or property moving from one place in a state to another place in the same state but over a line through another state was interstate commerce. Railroads and telegraph companies transact their business over constructed and permanently established reg-

ular routes and we do not deem the pronouncements in such cases applicable to the business of a motor carrier operating over irregular routes and in the manner that respondent has conducted his business.

[fol. 40] With equal force reliance is placed upon respondent's quoted tariff as a shield. The tariff filed with the Interstate Commerce Commission quotes a rate on various classes of goods between St. Louis, Missouri, and Kansas City, Kansas, and quotes the same rates between St. Louis and Kansas City, Missouri, with the words "interstate only" in parenthesis. This cannot be a shield of protection or any justification for respondent to engage in commerce which is in fact intrastate. It is more properly a badge of fraud when considered in connection with the manner in which respondent used it to solicit freight moving between the two cities in Missouri. It would be as logical, reasonable and practicable for him to quote a rate and carry freight over Missouri highways from St. Louis to St. Joseph via Elwood, Kansas, or to Palmyra via Quincy, Illinois, or Cape Girardeau via East End of the Bridge. If he were to do so no one would doubt the intrastate character of the business. Every shield that is interposed between fraud and right is transparent to the eye of justice. Due regard for the interests of legitimate carriers whose rights have been invaded, and the public concern in the maintenance of regulated traffic demand that the respondent's violations cease.

In our finding and conclusions from the evidence that respondent has unlawfully engaged in intrastate commerce, that his transportation of intrastate shipments across a state line was a subterfuge and a fraud, that the facts determine the true character of the business in which he was engaged, we are supported by numerous decisions and pronouncements of Courts and Commissions. *Sprout vs. South Bend* 277 U. S. 163, 168. *Clark vs. Poor* 274 U. S. 552. *Interstate Busses Corp. vs. Holyoke Street Railway Co.* 273 U. S. 45, 51. *Blackmore vs. P. S. C.* 183 Atl. 115. *Inter-City Coach Co. vs. Atwood*, 21 Fed. (2d) 83, 85. *Detroit-Cincinnati Coach Lines vs. P. U. C. of Ohio*, 119 Ohio State 324. *Daniels Motor Stages vs. P. S. C.* In Equity No. 608 and *Midland Stages vs. P. S. C.* In Equity No. 610 determined by a three-judge Federal Court in the Central Division of the Western District of Missouri, June 13, 1934.

[fol. 41] The violations of respondent are flagrant. The evidence shows that he is actively acquisitive and yields easily to temptation; that he has intentionally exceeded his authority; that he has violated the law and the rules of the Commission; and that he is guilty of a misdemeanor and subject to a fine or imprisonment under the applicable penal statute. Section 5275 Laws of Mo. 1931, Page 314.

A withdrawal of authority heretofore granted respondent appears to be fully justified and the Commission finds that his existing permit should be revoked.

Wherefore, after due consideration, it is,

Ordered: 1. That Permit No. T-3734 heretofore issued by this Commission under date of November 23, 1934, to Frank Eichholz doing business as Riteway Motor Service and authorizing him to operate interstate as a freight-carrying motor carrier over an irregular route be and the same is hereby recalled, revoked, set aside and for naught held.

Ordered: 2. That Frank Eichholz, doing business as Riteway Motor Service shall after the effective date of this order cease and desist from operation as a motor carrier of freight over the highways of the State of Missouri while engaged in intrastate commerce, and shall cease and desist from the exercise of any right or privilege heretofore granted to him under the permit which is by Ordered: 1 revoked.

Ordered: 3. That this order shall be in effect ten days from the date thereof and that the Secretary of the Commission shall forthwith serve certified copies of this report and order upon all interested parties as the law provides.

By the Commission.

Robert E. Holliway, Secretary. (Seal.)

Hargus, Chr., Anderson, Boyer, Nortoni and Ferguson,  
CC. Concur.

Dated at Jefferson City, Missouri, this 10th day of December, 1936.

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[fol. 42] IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER OF ROY MCKITTRICK—Filed January 22,  
1937

Comes now Roy McKittrick, Attorney-General of the State of Missouri, defendant herein, and for his separate answer to plaintiff's bill states:

## I

This defendant admits the allegations contained in the first paragraph of the Bill.

## II

Admits that this suit is an action of a civil nature; denies the dispute herein exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000.00); denies it is a controversy between citizens of the same state seeking to test the constitutionality of an order of the Public Service Commission of Missouri which interferes with interstate commerce, and denies that this question arises under the Constitution and laws of the United States, as alleged in paragraph II of the Bill.

[fol. 43]

## III

This defendant admits the allegations contained in the third paragraph of the Bill.

## IV

This defendant denies that since November 23, 1934 plaintiff has been continuously engaged in the transportation for hire of personal property as a common carrier in interstate commerce, as alleged in paragraph IV of the Bill.

## V

This defendant answering the fifth paragraph of the Bill specifically denies plaintiff operates a terminal building located at Shawnee and Adams Streets in Kansas City, Kansas.

Further answering, this defendant says he has no information sufficient to form a belief as to the allegation contained in the fifth paragraph of the Bill as to the plaintiff operating a terminal building located at 511 South Second Street, St. Louis, Missouri, a terminal building located at 309 North Rock Island Avenue, Wichita, Kansas, a terminal building located at 115 Eleventh Street, Des Moines, Iowa, and a terminal building located at 611 South Main Street, Burlington, Iowa, and therefore denies that plaintiff operates said terminal buildings.

Further answering, this defendant states he has no information sufficient to form a belief as to the number of pieces

of motor equipment plaintiff has in rendering service in the transportation of property for hire nor the number of pieces of motor equipment plaintiff has leased for said purpose and therefore denies plaintiff owns and operates thirty-seven (37) pieces of motor equipment in rendering service in the transportation of property in interstate commerce, and has leased thirty-two pieces (32) of motor equipment which he also operates in rendering service in the transportation of property between the States of Illinois, Missouri, Kansas, and Iowa.

[fol. 44]

## VI.

This defendant answering the sixth paragraph of the Bill says he has no information sufficient to form a belief as to the allegations therein contained and therefore denies plaintiff has invested large sums of money in motor vehicles, trucks, tractors and semi-trailers, and in terminal facilities; that he has established regular and convenient routes of travel for said motor vehicles between the terminals alleged in the Bill; that he maintains at said terminals agents and employees for receiving, checking, billing, and forwarding property for transportation; that he maintains proper and sufficient motor equipment, commonly known as road trucks, for the transportation of property between terminals, and provides and maintains at said terminals motor vehicles for rendering pick-up and delivery service between his terminals and consignors and consignees, as set out in the sixth paragraph of the Bill; specifically denies that he maintains said motor vehicles, both highway and terminal motor vehicles, as set out in plaintiff's tariff now on file with the Interstate Commerce Commission, as alleged in the sixth paragraph of the Bill.

## VII

This defendant further answering states he has no information sufficient to form a belief as to the allegations contained in the seventh paragraph of the Bill and therefore denies that plaintiff assembles at his terminals large numbers of shipments through the use of his pick-up equipment, which shipments are then loaded into the motor vehicles commonly known as road trucks and transported by said road trucks to the terminal to which the shipments are destined, and are there transferred to the dock and reloaded into the various delivery trucks to be delivered to the various

consignees in the commercial areas, as alleged in plaintiff's Bill. Specifically avers the fact to be that this defendant that plaintiff operates in the prosecution of his business a terminal building located at Shawnee and Adams Streets in Kansas City, Kansas, as alleged in the fifth paragraph and [fol. 45] referred to in the seventh paragraph of the Bill, but avers the fact to be that plaintiff does not operate a terminal building at Shawnee and Adams Streets, Kansas City, Kansas and does not own and operate pick-up equipment at said terminal *at said terminal* through which he assembles large numbers of shipments, which shipments are then loaded into motor vehicles commonly known as road trucks and transported by said road trucks to the terminal to which said shipments are destined, as alleged in the seventh paragraph and referred to in the fifth paragraph of the Bill.

### VIII

This defendant further answering states he admits the Seventy-Fourth Congress of the United States passed an Act, approved August 9, 1935, known as "Motor Carrier Act, 1935." Admits that by said Act the Interstate Commerce Commission was given exclusive jurisdiction to grant certificates of convenience and necessity to common carriers by motor vehicles in interstate commerce, to regulate rates and service of said carriers in interstate commerce. Further answering, this defendant says he has no information upon which to form a belief as to whether plaintiff in conformity to said Motor Carrier Act of 1935 has filed with the Interstate Commerce Commission an application on Form BMC 1, as provided by said Interstate Commerce Commission, said application being Docket No. MC-61959, and has filed with the Interstate Commerce Commission a schedule of rates for said transportation, and, therefore, denies that plaintiff in conformity to said Motor Carrier Act of 1935 has filed with the Interstate Commerce Commission an application on Form DMC 1, as provided by said Interstate Commerce Commission, said application being Docket No. MC-61959; denies that plaintiff filed with the Interstate Commerce Commission a schedule of rates for interstate transportation, and specifically denies that plaintiff has complied with all requirements of said Motor Carrier Act of 1935 and the orders of the Interstate Commerce Commission, as alleged in the eighth paragraph of the Bill.

[fol. 46]

## IX

Answering the allegations in the ninth paragraph of the Bill, this defendant admits that on November 23, 1934 the Public Service Commission of Missouri issued to plaintiff an Interstate Permit No. T-3734; admits that plaintiff filed with the Public Service Commission insurance policies and paid license fees and taxes, as required by the Public Service Commission Law of Missouri, for the transportation of property for hire over the highways of the State of Missouri for interstate movements and in interstate commerce only. Further answering, this defendant specifically denies that plaintiff has fully complied in all respects with the laws of the State of Missouri and the orders of the Public Service Commission of Missouri.

Further answering, this defendant admits that on July 22, 1936 the Public Service Commission instituted a proceeding to revoke the authority of Frank Eichholz, doing business as Riteway Motor Service, and holder of Interstate Permit No. T-3734 theretofore issued by the Public Service Commission of Missouri, said proceedings being docketed as Case No. T-5330; admits that on December 10, 1936 the Commission issued its order in Case T-5330 and revoked the permit and authority of plaintiff to operate in interstate commerce as a freight-carrying motor carrier over the highways of Missouri; admits that by subsequent order of said Public Service Commission the effective date of its order of December 10, 1936 was extended to December 30, 1936.

## X

This defendant further answering states he admits that on December 16, 1936 plaintiff filed with the Public Service Commission of Missouri an application for rehearing in said Case T-5330; that on December 23, 1936 defendant Commission issued its order overruling said application for rehearing. This defendant specifically denies that under the [fol. 47] decisions of the Court of Appeals and the Supreme Court of Missouri no appeal can be taken to the courts of last resort in the State from this order of the Public Service Commission.

Further answering, this defendant denies that the action of defendant Public Service Commission in issuing its said order of December 10, 1936 was unlawful, unreasonable, arbitrary and capricious; denies that the Public Service

Commission of Missouri attempted to exercise power and authority expressly delegated by the Congress of the United States to the Interstate Commerce Commission.

This defendant further answering denies that said order of defendant Public Service Commission, issued on December 10, 1936, is or was a direct burden and interference with interstate commerce and deprives plaintiff of his right to engage in interstate commerce; denies that the public is deprived of the use of plaintiff's facilities in the transportation of property in interstate commerce.

## XI

Answering the eleventh paragraph of the Bill this defendant denies that this defendant is threatening to arrest the drivers of said plaintiff's vehicles, thereby destroying the business of plaintiff; denies he has any intention to cause the arrest of plaintiff under the laws of the State of Missouri; denies that he is threatening or attempting to cause the filing of informations purporting to charge plaintiff with violations of law which will work irreparable damage to the public who are dependent on plaintiff for the transportation by plaintiff of their property.

Further answering, this defendant denies that the order of these Defendants of December 10, 1936 is contrary to and in violation of the Motor Carrier Act of 1935; denies that said order of December 10, 1936 is in violation of Article 3 of the Constitution of Missouri; specifically denies [fol. 48] that said order of the Public Service Commission of December 10, 1936 was or is in violation of Sections 1, 24 and 25 of Article 4 of the Constitution of Missouri; denies that plaintiff was without adequate remedy at law; denies that the acts of the Public Service Commission complained of in the Bill are illegal, without warrant and in direct interference with interstate commerce; denies that said actions invade the rights of plaintiff and deprive plaintiff of his liberty and property without due process of law in contravention of that part of Section 1 of Article 14 of the Constitution of the United States which provides as follows:

"No state shall make or enforce any laws which shall abridge the privilege or immunities of a citizen of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, or deny to any

person within its jurisdiction the equal protection of the laws."

Further answering, this defendant denies that said order of defendant Commission of December 10, 1936 was and is in violation of Section 8 of Article 1 of the Constitution of the United States.

## XII

Further answering, this defendant states that he denies that unless the defendant in this cause is restrained and enjoined from arresting and filing criminal charges against and prosecuting plaintiff, his drivers and employees, plaintiff will be required to defend a multiplicity of criminal actions; denies that plaintiff's property and business will be destroyed; specifically denies that plaintiff has no other adequate remedy at law.

Roy McKittrick, Attorney-General of the State of  
Missouri, Defendant, by Covell R. Hewitt, As-  
sistant Attorney-General.

[fol. 49] *Duly sworn to by Covell R. Hewitt. Jurat omitted in printing.*

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[fol. 50]      IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER OF B. M. CASTEEL—Filed January 22, 1937

Comes now B. M. Casteel, Superintendent of Missouri State Highway Patrol, defendant herein, and for his separate answer to plaintiff's Bill states:

## I

This defendant admits the allegations contained in the first paragraph of the Bill.

## - II

Admits that this suit is an action of a civil nature; denies the dispute herein exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000.00); denies it is a controversy between citizens of the same state seeking to test the constitutionality of an order of the Public Service Commission of Missouri which interferes

with interstate commerce, and denies that this question arises under the Constitution and laws of the United States, as alleged in paragraph II of the Bill.

### III

This defendant admits the allegations contained in the third paragraph of the Bill.

### IV

This defendant denies that since November 23, 1934, plaintiff has been continuously engaged in the transportation for hire of personal property as a common carrier in interstate commerce, as alleged in paragraph IV of the Bill.

[fol. 51]

### V

This defendant answering the fifth paragraph of the Bill specifically denies plaintiff operates a terminal building located at Shawnee and Adams Streets in Kansas City, Kansas.

Further answering, this defendant says he has no information sufficient to form a belief as to the allegation contained in the fifth paragraph of the Bill as to the plaintiff operating a terminal building located at 511 South Second Street, St. Louis, Missouri, a terminal building located at 309 North Rock Island Avenue, Wichita, Kansas, a terminal building located at 115 Eleventh Street, Des Moines, Iowa, and a terminal building located at 611 South Main Street, Burlington, Iowa, and therefore denies that plaintiff operates said terminal buildings.

Further answering, this defendant states he has no information sufficient to form a belief as to the number of pieces of motor equipment plaintiff has in rendering service in the transportation of property for hire nor the number of pieces of motor equipment plaintiff has leased for said purpose and therefore denies plaintiff owns and operates thirty-seven (37) pieces of motor equipment in rendering service in the transportation of property in interstate commerce, and has leased thirty-two pieces (32) of motor equipment which he also operates in rendering service in the transportation of property between the States of Illinois, Missouri, Kansas, and Iowa.

## VI

This defendant answering the sixth paragraph of the Bill says he has no information sufficient to form a belief as to the allegations therein contained and therefore denies plaintiff has invested large sums of money in motor vehicles, trucks, tractors and semi-trailers, and in terminal facilities; that he has established regular and convenient routes of travel for said motor vehicles between the terminals alleged [fol. 52] in the Bill; that he maintains at said terminals agents and employees for receiving, checking, billing, and forwarding property for transportation; that he maintains proper and sufficient motor equipment, commonly known as road trucks, for the transportation of property between terminals, and provides and maintains at said terminals motor vehicles for rendering pick-up and delivery service between his terminals and consignors and consignees, as set out in the sixth paragraph of the Bill; specifically denies that he maintains said motor vehicles, both highway and terminal motor vehicles, as set out in plaintiff's tariff now on file with the Interstate Commerce Commission, as alleged in the sixth paragraph of the Bill.

## VII

This defendant further answering states he has no information sufficient to form a belief as to the allegations contained in the seventh paragraph of the Bill and therefore denies that plaintiff assembles at his terminals large numbers of shipments through the use of his pick-up equipment, which shipments are then loaded into the motor vehicles commonly known as road trucks and transported by said road trucks to the terminal to which the shipments are destined, and are there transferred to the dock and reloaded into the various delivery trucks to be delivered to the various consignees in the commercial areas, as alleged in plaintiff's Bill. Specifically avers the fact to be that this defendant that plaintiff operates in the prosecution of his business a terminal building located at Shawnee and Adams Streets in Kansas City, Kansas, as alleged in the fifth paragraph and referred to in the seventh paragraph of the Bill, but avers the fact to be that plaintiff does not operate a terminal building at Shawnee and Adams Streets, Kansas City, Kansas and does not own and operate pick-up equipment at

[fol. 53] said terminal *at said terminal* through which he assembles large numbers of shipments, which shipments are then loaded into motor vehicles commonly known as road trucks and transported by said road trucks to the terminal to which said shipments are destined, as alleged in the seventh paragraph and referred to in the fifth paragraph of the Bill.

## VIII

This defendant further answering states he admits the Seventy-Fourth Congress of the United States passed an Act, approved August 9, 1935, known as "Motor Carrier Act, 1935." Admits that by said Act the Interstate Commerce Commission was given exclusive jurisdiction to grant certificates of convenience and necessity to common carriers by motor vehicles in interstate commerce, to regulate rates and service of said carriers in interstate commerce. Further answering, this defendant says he has no information upon which to form a belief as to whether plaintiff in conformity to said Motor Carrier Act of 1935 has filed with the Interstate Commerce Commission an application on Form BMC 1, as provided by said Interstate Commerce Commission, said application being Docket No. MC-61959, and has filed with the Interstate Commerce Commission a schedule of rates for said transportation, and, therefore, denies that plaintiff in conformity to said Motor Carrier Act of 1935 has filed with the Interstate Commerce Commission an application on Form DMC 1, as provided by said Interstate Commerce Commission, said application being Docket No. MC-61959; denies that plaintiff filed with the Interstate Commerce Commission a schedule of rates for interstate transportation, and specifically denies that plaintiff has complied with all requirements of said Motor Carrier Act of 1935 and the orders of the Interstate Commerce Commission, as alleged in the eighth paragraph of the Bill.

[fol. 54]

## IX

Answering the allegations in the ninth paragraph of the Bill, this defendant admits that on November 23, 1934, the Public Service Commission of Missouri issued to plaintiff an Interstate Permit No. T-3734; admits that plaintiff filed with the Public Service Commission insurance policies and paid license fees and taxes, as required by the Public Serv-

ice Commission Law of Missouri, for the transportation of property for hire over the highways of the State of Missouri for interstate movements and in interstate commerce only. Further answering, this defendant specifically denies that plaintiff has fully complied in all respects with the laws of the State of Missouri and the orders of the Public Service Commission of Missouri.

Further answering, this defendant admits that on July 22, 1936 the Public Service Commission instituted a proceeding to revoke the authority of Frank Eichholz, doing business as Riteway Motor Service, and holder of Interstate Permit No. T-3734 theretofore issued by the Public Service Commission of Missouri, said proceedings being docketed as Case No. T-5330; admits that on December 10, 1936 the Commission issued its order in Case T-5330 and revoked the permit and authority of plaintiff to operate in interstate commerce as a freight-carrying motor carrier over the highways of Missouri; admits that by subsequent order of said Public Service Commission the effective date of its order of December 10, 1936 was extended to December 30, 1936.

## X

This defendant further answering states he admits that on December 16, 1936, plaintiff filed with the Public Service Commission of Missouri an application for rehearing in [fol. 55] said Case T-5330; that on December 23, 1936 defendant Commission issued its order overruling said application for rehearing. This defendant specifically denies that under the decisions of the Court of Appeals and the Supreme Court of Missouri no appeal can be taken to the courts of last resort in the State from this order of the Public Service Commission.

Further answering, this defendant denies that the action of defendant Public Service Commission in issuing its said order of December 10, 1936 was unlawful, unreasonable, arbitrary and capricious; denies that the Public Service Commission of Missouri attempted to exercise power and authority expressly delegated by the Congress of the United States to the Interstate Commerce Commission.

This defendant further answering denies that said order of defendant Public Service Commission, issued on December 10, 1936, is or was a direct burden and interference with interstate commerce and deprives plaintiff of his right

to engage in interstate commerce; denies that the public is deprived of the use of plaintiff's facilities in the transportation of property in interstate commerce.

## XI

Answering the eleventh paragraph of the Bill this defendant denies that this defendant is threatening to arrest the drivers of said plaintiff's vehicles, thereby destroying the business of plaintiff; denies he has any intention to cause the arrest of plaintiff under the laws of the State of Missouri; denies that he is threatening or attempting to cause the filing of informations purporting to charge plaintiff with violations of law which will work irreparable damage to the public who are dependent on plaintiff for the transportation by plaintiff of their property.

[fol. 56] Further answering, this defendant denies that the order of these Defendants of December 10, 1936 is contrary to and in violation of the Motor Carrier Act of 1935; denies that said order of December 10, 1936 is in in violation of Article 3 of the Constitution of Missouri; specifically denies that said order of the Public Service Commission of December 10, 1936 was or is in violation of Sections 1, 24 and 25 of Article 4 of the Constitution of Missouri; denies that plaintiff was without adequate remedy at law; denies that the acts of the Public Service Commission complained of in the Bill are illegal, without warrant and in direct interference with interstate commerce; denies that said actions invade the rights of plaintiff and deprive plaintiff of his liberty and property without due process of law in contravention of that part of Section 1 of Article 14 of the Constitution of the United States which provides as follows:

"No state shall make or enforce any laws which shall abridge the privilege or immunities of a citizen of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws."

Further answering, this defendant denies that said order of defendant Commission of December 10, 1936 was and is in violation of Section 8 of Article 1 of the Constitution of the United States.

## XII

Further answering, this defendant states that he denies that unless the defendant in this cause is restrained and enjoined from arresting and filing criminal charges against and prosecuting plaintiff, his drivers and employees, plaintiff will be required to defend a multiplicity of criminal actions; denies that plaintiff's property and business will [fol. 57] be destroyed; specifically denies that plaintiff has no other adequate remedy at law.

B. M. Casteel, Superintendent of Missouri, State Highway Patrol, by Roy McKittrick, Attorney-General; Covell R. Hewitt, Assistant Attorney-General.

*Duly sworn to by Covell R. Hewitt. Jurat omitted in printing.*

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[fol. 58] IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION AND FINDINGS OF FACT ON PLAINTIFF'S APPLICATION FOR A TEMPORARY INJUNCTION—Filed February 3, 1937

Per CURIAM:

Frank Eichholz, the plaintiff, is a common carrier of freight by automobile trucks, operating over established lines between terminal buildings belonging to him and located in St. Louis, Missouri, Kansas City, Kansas, Wichita, Kansas, Des Moines, Iowa, and Burlington, Iowa. His contention is that he is engaged in interstate commerce only. On the theory that he proposed to and would engage only in interstate commerce in Missouri, he applied for and on November 23, 1934, was granted by the Public Service Commission an "interstate permit," authorizing him to operate over the highways of Missouri in interstate commerce. Subsequently, by an order effective December 30, 1936, the Public Service Commission revoked the permit granted in [fol. 59] 1934. The defendants having threatened to cause the arrest of plaintiff's employees, operating his trucks, if they operate them after December 30, 1936, plaintiff filed his bill here, setting up inter alia the facts stated and praying injunctive relief. The question now to be determined is whether plaintiff shall have a temporary injunc-

tion restraining defendants from proceeding against plaintiff and his employees for operating plaintiff's trucks on the highways of Missouri.

Upon the question stated we have heard evidence (in the form of a transcript of the testimony taken by the Public Service Commission and in the form of affidavits), all of which, together with the allegations of the verified bill and the argument of counsel we have considered.

The theory upon which the plaintiff's permit was revoked (that theory is best presented in the report of the Public Service Commission accompanying its order of revocation) is that the plaintiff has abused its privileges under its permit in that actually it has engaged in intra-state commerce, fraudulently undertaking to give to its intra-state commerce the appearance of interstate commerce by unnecessarily crossing a state line in the transportation of goods from one point in Missouri to another point in Missouri. This crossing of a state line, the Commission found, was a mere sham and pretext whereby plaintiff sought to avoid state supervision and to undercut intra-state freight rates.

In justice to the Public Service Commission it should be said that at the hearing before that body the plaintiff here [fol. 60] put on no testimony. There the plaintiff maintained that, whatever is its motive in crossing a state line with goods being shipped from one point in Missouri to another point in Missouri and however artificial the crossing of the state line is, if it does cross a state line the commerce is interstate and not subject to state regulation. The evidence before us presents perhaps a truer picture of the nature of plaintiff's business than that which was considered by the Commission.

The essential facts, as they are disclosed at this stage of this proceeding, are these (and we find them to be the facts):

1. The plaintiff transports freight by automobile trucks as a common carrier between freight terminals or depots located in St. Louis, Missouri, Kansas City, Kansas, Wichita, Kansas, Des Moines, Iowa, and Burlington, Iowa. By far the largest part of its business consists of the transportation of goods from points in one state to points in other states. A small percentage of its business (approximately 5%) consists in the transportation of goods from

points in Missouri to other points in Missouri, chiefly from Kansas City, Missouri, to St. Louis, Missouri, and from St. Louis, Missouri, to Kansas City, Missouri.

2. At St. Louis, Missouri (and so also at each of the cities at which plaintiff has a terminal or depot) the plaintiff renders to its patrons a so-called "pick up" service. This service it renders to all its patrons living within a circle having a radius of twenty-five miles, the center of which is at the plaintiff's terminal or depot. The plaintiff picks up at the place of business of a patron the consignment he desires to have transported, carries that consignment to the terminal or depot, unloads it on a dock there situated, thence it is loaded on a line truck and by that line truck transported to some other of the plaintiff's terminals or depots. [fol. 61] It is unloaded from the line truck at the terminal or depot of its destination. At that terminal or depot, as at each other of plaintiff's terminals or depots, a "delivery service" is rendered by plaintiff. Plaintiff causes the shipment to be loaded on to a delivery truck and by that truck carried to the place of business of the consignee. This "delivery service," like the "pick up" service, is rendered to patrons of the plaintiff living within a circle having a twenty-five mile radius, the center of which is the terminal or depot of the plaintiff. Since the St. Louis "pick up" service area of the plaintiff, the center of which is the St. Louis, Missouri, terminal of the plaintiff, necessarily includes a part of Missouri, and since the Kansas City, Kansas "delivery" area, the center of which is at the plaintiff's terminal in Kansas City, Kansas, necessarily also includes a part of Missouri, some consignments will be from consignors whose places of business are in Missouri to consignees whose places of business also are in Missouri. All consignments, however, from the St. Louis, Missouri "pick up" area to the Kansas City, Kansas, "delivery" area are transported in due and regular course of plaintiff's business (and necessarily are so transported) from plaintiff's terminal or depot in St. Louis, Missouri, to plaintiff's terminal or depot in Kansas City, Kansas. So also as to consignments from the Kansas City, Kansas, "pick up" area to the St. Louis, Missouri, "delivery" area.

3. Conforming with the laws enacted by Congress plaintiff has filed with the Interstate Commerce Commission

schedules of its rates for the transportation of freight and full information touching the points between which it carries freight, and in connection with each of these points a full statement as to the "pick up" and "delivery" service there rendered and the areas within which that service is rendered, all of which it is required to do by laws enacted by Congress. The plaintiff carries no freight except in accordance with its freight rates on file with the Interstate Commerce Commission. Plaintiff carries no freight between any points in Missouri save and except that which in the usual and regular course of its business it carries from a terminal in one state to a terminal in another state.

In view of what at the present stage of this proceeding we have found to be the facts (the final hearing may, of [fol. 62] course, disclose entirely different facts) it is not necessary for us to inquire whether, if the plaintiff actually was engaged in what really is intra-state commerce, carrying goods from one point in Missouri to another point in Missouri, endeavoring by sham and subterfuge to make that business appear to be interstate commerce, it would be subject to regulation by the state. Upon the facts which have been found no question can be made but that all of the business carried on by plaintiff is interstate commerce and that there is present in plaintiff's plan of business no sham or subterfuge that might conceivably, when removed, be found to cover up what really is commerce intra-state.

A temporary injunction will issue. Counsel for plaintiff will submit to the court for approval and entry an appropriate decree and with it an appeal bond in the amount of \$1,000 to secure the defendants against damage.

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[fol. 63]      IN UNITED STATES DISTRICT COURT

ORDER GRANTING TEMPORARY INJUNCTION—Filed February  
15, 1937

Now on this 23rd day of January, 1937, comes the plaintiff by his attorney, and defendants Sam O. Hargus, W. M. Anderson, John S. Boyer, Albert D. Nortoni, John A. Ferguson, Public Service Commissioners of the State of Missouri; Roy McKittrick, Attorney-General of the State of Missouri; and B. M. Casteel, Superintendent, State High-

way Patrol, by their attorney, and the application of the plaintiff for a temporary injunction is duly called for hearing.

From said verified bill for injunction filed herein and the transcript of the testimony taken before the Public Service Commission and affidavits herein filed, the Court finds as follows:

1. The plaintiff transports freight by automobile trucks as a common carrier between freight terminals or depots located in St. Louis, Missouri, Kansas City, Kansas, Wichita, Kansas, Des Moines, Iowa, and Burlington, Iowa. By far the largest part of its business consists of the transportation of goods from points in one state to points in other states. A small percentage of its business (approximately 5%) consists in the transportation of goods from points in Missouri to other points in Missouri, chiefly from Kansas City, Missouri, to St. Louis, Missouri, and from St. Louis, Missouri, to Kansas City, Missouri.

2. At St. Louis, Missouri (and so also at each of the cities at which plaintiff has a terminal or depot) the plaintiff renders to its patrons a so-called "pick-up" service. This service it renders to all its patrons living within a circle having a radius of twenty-five miles, the center of which is at the plaintiff's terminal or depot. The plaintiff picks up at the place of business of a patron the consignment he desires to have transported, carries that consignment to [fol. 64] the terminal or depot, unloads it on a dock there situated, thence it is loaded on a line truck and by that line truck transported to some other of the plaintiff's terminals or depots. It is unloaded from the line truck at the terminal or depot of its destination. At that terminal or depot, as at each other of plaintiff's terminals or depots, a "delivery service" is rendered by plaintiff. Plaintiff causes the shipment to be loaded on to a delivery truck and by that truck carried to the place of business of the consignee. This "delivery service," like the "pick up" service, is rendered to patrons of the plaintiff living within a circle having a twenty-five mile radius, the center of which is the terminal or depot of the plaintiff. Since the St. Louis "pick up" service area of the plaintiff, the center of which is the St. Louis, Missouri, terminal of the plaintiff, neces-

sarily includes a part of Missouri, and since the Kansas City, Kansas "delivery" area, the center of which is at the plaintiff's terminal in Kansas City, Kansas, necessarily also includes a part of Missouri, some consignments will be from consignors whose places of business are in Missouri to consignees whose places of business also are in Missouri. All consignments, however, from the St. Louis, Missouri "pick up" area to the Kansas City, Kansas, "delivery" area are transported in due and regular course of plaintiff's business (and necessarily are so transported) from plaintiff's terminal or depot in St. Louis, Missouri, to plaintiff's terminal or depot in Kansas City, Kansas. So also as to consignments from the Kansas City, Kansas, "pick up" area to the St. Louis, Missouri, "delivery" area.

3. Conforming with laws enacted by Congress plaintiff has filed with the Interstate Commerce Commission schedules of its rates for the transportation of freight and full information touching the points between which it carries freight, and in connection with each of these points a full statement as to the "pick up" and "delivery" service there rendered and the areas within which that service is rendered, all of which it is required to do by laws enacted by Congress. The plaintiff carries no freight except in accordance with its freight rates on file with the Interstate Commerce Commission. Plaintiff carries no freight between any points in Missouri save and except that which in the usual and regular course of its business it carries from a terminal in one state to a terminal in another state.

[fol. 65] It is therefore ordered, adjudged and decreed by the Court that the defendants, Sam O. Hargus, W. M. Anderson, John S. Boyer, Albert D. Norton, John A. Ferguson, Public Service Commissioners of the State of Missouri; Roy McKittrick, Attorney-General of the State of Missouri; and B. M. Casteel, Superintendent, State Highway Patrol, and each of them, their respective agents, servants and employees be and they are hereby restrained and enjoined pending a final determination of this cause from arresting, prosecuting, or assisting in the prosecution of any criminal suit against plaintiff for using the highways of the State of Missouri in the transportation of property for hire by motor vehicle.

This temporary injunction shall become effective on the giving of security by the plaintiff by filing a bond in the sum

of One Thousand Dollars (\$1000.00), conditioned upon the payment of such costs and damages as may be incurred and suffered by any of the parties who may be found to have been wrongfully enjoined or restrained hereby.

Dated this 15th day of February, 1937.

Kimbrough Stone, United States Circuit Judge. Albert L. Reeves, United States District Judge. Merrill E. Otis, United States District Judge.

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[fol. 66] IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION

To D. D. McDonald, Counsel for Plaintiff in the Above Entitled Cause:

You are hereby notified that the undersigned Defendants will, on Friday, April 30, 1937, file in the Federal Court at Kansas City, Missouri the within and attached motion of which you will take notice and govern yourself accordingly.

James P. Boyd, General Counsel, Public Service Commission of Missouri; Daniel C. Rogers, Assistant Counsel, Public Service Commission of Missouri, Solicitors for Sam O. Hargus, W. M. Anderson, John S. Boyer, Albert D. Nortoni, John A. Ferguson, Public Service Commissioners of the State of Missouri.

Received copy of the above notice together with copy of motion this 28th day of April, 1937.

D. D. McDonald.

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[fol. 67] IN UNITED STATES DISTRICT COURT

MOTION TO DISSOLVE TEMPORARY INJUNCTION—Filed April 30, 1937

Come now Defendants, Sam O. Hargus, W. M. Anderson, John S. Boyer, Albert D. Nortoni, John A. Ferguson, Public Service Commissioners of the State of Missouri, and for their joint and separate motion move the Court to set aside its order of February 15, 1937 granting temporary injunction against these Defendants and other defendants named

in the bill in the above entitled cause and to hear the case upon its merits.

These movants further state to the Court that since the hearing of this case there has been new and additional evidence of the Plaintiff on various and divers occasions transporting property in intrastate commerce within the State of Missouri; that in order to show that the Plaintiff has been engaged in intrastate commerce within the State of Missouri [fol. 68] in violation of his right to transport property for hire over the highways of the State of Missouri, it will be necessary to take evidence of witnesses in Kansas City, Missouri, St. Louis, Missouri and other points in Missouri; that it is the belief of these Defendants time will be saved for this Court and expenses will be saved for these litigants if a Special Master should be appointed by this Court to hear the evidence in this case at Kansas City, Missouri, Jefferson City, Missouri, St. Louis, Missouri and any other points the Master may order or direct and make the finding for this Court; that if the Court find in its discretion such would be to the best interests of the Court and the litigants herein, the Court make such an order.

Wherefore, these Defendants pray the Court to set aside its order and dissolve the temporary injunction heretofore granted in this cause, that upon final hearing the permanent injunction be denied and these Defendants be dismissed with their costs in this behalf laid out and expended, and for such other and general orders as seem meet in the premises.

James P. Boyd, General Counsel, Public Service Commission of Missouri; Daniel C. Rogers, Assistant Counsel, Public Service Commission of Missouri, Solicitors for Sam O. Hargus, W. M. Anderson, John S. Boyer, Albert D. Nortoni, John A. Ferguson, Public Service Commissioners of the State of Missouri.

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[fol. 69]      IN UNITED STATES DISTRICT COURT

SUPPLEMENTARY ANSWER AND COUNTERCLAIM OF DEFENDANT  
PUBLIC SERVICE COMMISSION—(Rec'd in Custody of the  
Clerk But Not Filed as Part of This Case, February 2.  
1938)

Comes now Public Service Commission, one of the defendants in the above entitled cause and, with permission of the

Court, files this supplementary answer as its counterclaim against plaintiff for fees owing by plaintiff to the State of Missouri for the use of its public highways, and states that plaintiff's liability to the State of Missouri for such fees has occurred since the filing of plaintiff's bill in equity.

This defendant states that plaintiff since the filing of his original bill has continued to operate upon and over the highways of the State of Missouri, daily, large numbers of trucks carrying property as a common carrier or motor carrier. Defendant states that plaintiff does now and will at the determination of this cause of action owe the State of Missouri a large amount of money in the nature of fees for the use of its public highways since approximately January 1, 1937.

Defendant states that the number of trucks and the times and places of their operation upon and over the highways of the State of Missouri constitutes information wholly within the knowledge of the plaintiff, and states that it does not have access to plaintiff's records or other means to determine the amount of money owing by plaintiff to the State of Missouri, and states that only by an accounting conducted under the jurisdiction of this Court may defendant and the State of Missouri have an adequate remedy for recovery of the aforesaid fees.

Wherefore, defendant Public Service Commission prays the Court to take jurisdiction of this counterclaim as an action in equity, and to provide the means whereby the amount of moneys owing by plaintiff to the State of Missouri may be equitably and accurately determined, and for such other relief in the premises as the Court may deem just and proper.

James P. Boyd, and Daniel C. Rogers, Solicitors for  
Public Service Commission.

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[fol. 70] IN UNITED STATES DISTRICT COURT

Before Stone, Circuit Judge, and Reeves and Otis, District  
Judges

OPINION—Filed March 24, 1938

REEVES, J.:

This is a suit to enjoin the cancellation or revocation of a permit granted to plaintiff as an interstate motor carrier,

and bearing date November 23, 1934. The order of revocation was made effective December 30, 1936. A temporary injunction was granted January 23, 1937, and the case was tried and submitted on final hearing February 2, 1938.

An order of a state administrative board being challenged, a three-judge court was constituted in conformity with Section 380, Title 28, U. S. C. A.

[fol. 71] Section 5268 (b), Laws Missouri 1931, relating to Motor Vehicles, provides for the granting of permits by the Public Service Commission of the State of Missouri to motor carriers desiring "to use any of the public highways of this state for the transportation of persons or property, or both, in interstate commerce \* \* \*."

In accepting such permits the carriers become obligated to pay certain license fees at times and in accordance with schedules prescribed by law.

By Section 5269, Laws Missouri, 1931, supra., "The commission may at any time, for good cause, suspend, and upon at least ten days notice to the grantee of any certificate, and an opportunity to be heard, revoke, alter or amend any certificate issued under the provisions of this act."

The permit granted to the plaintiff by the Public Service Commission of Missouri authorized him to "operate interstate as a freight carrying motor carrier over an irregular route as follows: From all points in Missouri to points beyond the state and from points beyond Missouri to all points within the state, exclusively in interstate commerce."

At the time this permit was granted there was in effect a rule (having the force of law) promulgated by the Public Service Commission of Missouri as authorized by Statute, and known as Rule No. 44. By this rule the holders of interstate permits were forbidden to transport within the state property accepted in the state and "known to be destined to a point within the state of Missouri." It was further provided that "if such interstate carrier accepts within Missouri property destined to a point beyond the limits of the state of Missouri such property shall not be terminated within the state of Missouri."

[fol. 72] The reason for the attempted cancellation of plaintiff's interstate permit was, as it was charged, that he was operating in violation of said permit. Such violation consisted in carrying property from one point in Missouri to another point in Missouri as an intrastate carrier whereas he did not have a license as such.

Although the plaintiff made no complaint of the license fees exacted under the laws of Missouri, nevertheless, he has not paid the usual fees since the granting of the temporary restraining order on December 31, 1936. He has been carrying on his regular business as a carrier under the protection of this court's restraining order. As a result, a supplemental answer has been filed asking this court to grant a hearing in the nature of an accounting of fees to the State of Missouri from the plaintiff on account of his operations since the protective restraining order was granted.

The temporary injunction heretofore granted by this court was predicated upon the record of evidence before the Public Service Commission, *ex parte* affidavits, and some additional oral testimony. At that time it was made to appear that a small percentage of the property carried by plaintiff was between points in Missouri, and that such transportation was effected by carriage from St. Louis, Missouri, to a terminal station in Kansas City, Kansas, and, that, because of a zone within which a pickup service was authorized, a small amount of property was picked up in Kansas City, Missouri, assembled at the terminal in Kansas City, Kansas, and then transported to St. Louis, Missouri for delivery. [fol. 73] The facts as then presented warranted the court in issuing a temporary injunction, as a matter of judicial "convenience" until final hearing on the merits. Plaintiff has regular line hauls and fixed terminal depots. Its chief line hauls are between its terminals or depots at St. Louis, Missouri, Kansas City, Kansas, Wichita, Kansas, Des Moines, Iowa, and Burlington, Iowa. Between these points admittedly it hauls a large volume of freight. From its depot or terminal point at Kansas City, Kansas, it has a pickup zone with a radius of twenty-five miles. Its terminal in Kansas City, Kansas, is within one-half mile of the Missouri State Line and a very few blocks from the trafficway connecting Kansas City, Kansas with Kansas City, Missouri.

At that point, according to the testimony, it is in very close proximity to several heavy shippers, including meat packers. There is an inference from the testimony that it hauls considerable property for these shippers. During its operations it has carried a great deal of merchandise from shippers or consignors at St. Louis, Missouri, to consignees in Kansas City, Missouri. In many instances such shipments were made in truckload lots so that the plaintiff

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continued the line haul from his terminal in St. Louis to the depot or terminal in Kansas City, Kansas, and a new driver, and probably a new tractor, made the delivery by transporting the same merchandise or property back into Missouri over the identical trafficways used in going to the terminal in Kansas City, Kansas.

Plaintiff testified that its transportation of property or merchandise between points in Missouri aggregated 10 per cent. of his traffic. One witness for the defendant testified that the percentage aggregated 40 per cent. of the entire [fol. 74] business across the state. Another witness testified that the intrastate traffic would aggregate 25% of the total volume. In many instances it was the habit of shippers in Missouri to consign their merchandise to themselves or some person at the terminals in Kansas City, Kansas, and then reconsign the same merchandise to a Missouri point.

Other facts will be stated as they become pertinent in the course of this memorandum opinion.

1. At the outset, it is contended by the plaintiff that, having engaged in interstate commerce, the acts of Congress would be supreme and exclusive, and that he is not subject to supervision by state authorities.

Such was the holding in *Missouri Pacific Railroad Co. v. Stroud*, 267 U. S. 404, loc. cit. 408. The court said: "It is elementary and well settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive."

An examination of the national Motor Carriers Act, however, does not reveal an intention of the Congress to occupy the entire field and to exclude the authority of the states. Section 302, Title 49, U. S. C. A. contains a "Declaration of policy and delegation of jurisdiction to Interstate Commerce Commission." By subdivision (a) of said Section it is the expressed purpose of the Congress to "cooperate with the several states and the duly authorized officials thereof \* \* \* in the administration and enforcement of this chapter." And then, by subdivision (c): "Nothing in this chapter shall be construed to affect the powers of taxation of the several states *or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each state of the* [fol. 75] *power of regulation of intrastate commerce by motor carriers on the highways thereof.*"

It will be seen from the foregoing that it was the intention of the Congress to leave with each state the exclusive right to regulate and control intrastate commerce by motor carriers on the highways of such state. This exclusive right could not be exercised properly if the state were compelled to await a determination and a conclusion of the interstate commerce commission in every case as to whether traffic belonged to interstate commerce or to intrastate commerce. It must be obvious that in case the Interstate Commerce Commission should determine that a particular haul or carriage was interstate commerce, a ruling to the contrary by the state authorities would be unavailing, but in the absence of conflict, the decision of the State authorities would prevail.

Again, it appears from the evidence that the Interstate Commerce Commission, because of a congestion of applications from motor carriers, has been unable to exercise prompt supervision over interstate motor carriers.

In the case of *Sproles v. Binford*, 286 U. S. 374, l. c. 390, the court said:

“ ‘In the absence of national legislation especially covering the subject of interstate commerce, the state may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens.’ ”

This principle was taken and approved from the case of *Morris v. Doby*, 274 U. S. 135.

The rule announced in the *Minnesota Rate* cases, 230 U. S. 352, was to the effect that the states may act within their [fol. 76] respective jurisdictions until Congress sees fit to act. In this case, while the Congress has acted, it has not only left with the states a large measure of authority in determining what is and what is not intrastate commerce, but it has not as yet been able to make its legislation effective. Until that has been done the federal courts must, in a large measure, recognize state regulations and follow the decisions upon such regulations by the duly constituted state authorities. In this case, the Public Service Commission of the State, after due process, has determined that the plaintiff was engaging in intrastate commerce, and that because of such violation of its interstate permit the com-

mission exercised its right under the statute to cancel such permit.

2. However, assuming that the ruling of the Public Service Commission of Missouri is not binding upon us, in the absence of a definite contrary ruling by the interstate commerce commission, the question for us to determine is whether the operations of the plaintiff as gleaned from the above facts were, in part at least, intrastate. This is purely a factual question. *Ohio R. R. Commission v. Worthington*, 225 U. S. 102, loc. cit. 108.

As said in the last case, loc. cit. 110, "The test of through billing is not necessarily determinative" of the question as to whether it is intrastate or interstate commerce.

The subject was discussed in *Southern Pacific Terminal Co. v. Interstate Commerce Commission and Young*, 219 U. S. 498, where a shipment was made from sundry points in Texas to a shipper as consignee at Galveston. At that [fol. 77] point the property shipped was prepared for export. The court properly held that such transportation was within the jurisdiction of the Interstate Commerce Commission. The shipper was denied the advantage of a lower tariff, because the court said that it constituted an undue preference in his favor.

In the case of *Baltimore & Ohio S. W. R. R. Co. v. Settle*, 260 U. S. 166, loc. cit. 170, the court said:

"And whether the interstate or the intrastate tariff is applicable depends upon the essential character of the movement. That the contract between shipper and carrier does not necessarily determine the character was settled by a series of cases in which the subject received much consideration."

The court then cited some of the cases hereinbefore discussed, as well as *Texas & New Orleans R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, *Railroad Commission of Louisiana v. Texas & Pac. Ry. Co.*, 229 U. S. 336.

Conversely to the contentions here made, the Supreme Court held in *Baltimore & Ohio Co. v. Settle*, supra, adopting the same principle announced in *Baer Bros. Mercantile Co. v. Denver & R. G. R. R. Co.*, 233 U. S. 479:

"That a carrier cannot, by separating the rate into its component parts, charging local rates and issuing local way

bills, convert an interstate shipment into intrastate transportation, and thereby deprive a shipper of the benefit of an appropriate rate for a through interstate movement."

In this case, the plaintiff hauled truckloads of merchandise from shippers or consignors in St. Louis, Missouri, to consignees in Kansas City, Missouri. It was neither a normal nor a natural route, to extend the carriage to the terminal depot in Kansas City, Kansas. There was no reason for it. It was not a matter of convenience to the shipper, [fol. 78] nor was it a matter of convenience to the carrier. Immediately that the haul terminated at the depot or terminal in Kansas City, Kansas, a new driver and in some instances with the same tractor took the merchandise or property back over the same trafficway and effected immediate delivery in Kansas City, Missouri. It was patent that the object of the shipper was to secure the benefit of a lower tariff by converting the shipment into an interstate haul. The shipping charges were approximately one-third less if in interstate commerce than if in intrastate commerce.

The plaintiff has cited in support of his contention the very recent case of *Roundtree v. Terrell, et al.*, decided February 17, 1938, in the Northern District of Texas. That case, as this case, pended before a three-judge court. The motor carrier hauled merchandise from points in Texas, through Texarkana to Little Rock, Arkansas. Some of the shipments or consignments were unloaded at a terminal or depot in Texarkana, Arkansas, and then carried back and delivered to consignees at Texarkana, Texas. The Texas court upheld the operation as interstate commerce. In doing so, it said that the pickup or delivery truck at Texarkana was not a line haul truck, but it was a local truck bearing an Arkansas license. It said, furthermore, that the merchandise from the line haul came to rest and was unloaded at the carrier's depot in Texarkana, Arkansas. The court further found concerning the shipment:

"It is unloaded there in the night time, and the next morning the local delivery truck makes delivery of it within the municipal limits to whichever side of the city it may be consigned. \* \* \* The line trucks reach Texarkana about four or five o'clock in the morning, all places of business are closed, such freight as is consigned to that point is un-[fol. 79] loaded and locked in the warehouse, the line truck then proceeds on to Little Rock. \* \* \* The freight which

originates in Texas and is subsequently delivered to Texarkana, Texas, must be and is transported over the line into Arkansas, and comes to rest in the warehouse in that state."

The court then said concerning this method of operation:

"It would not seem appropriate to compel the complainant to deliver freight in Texarkana, Texas, as he passes through in the night time rather than following his legally chosen method of unloading it at his warehouse and then delivering it to the consignee, by another carrier, during business hours."

The situation here is vastly different. In a few instances no doubt the merchandise picked up at St. Louis is unloaded at the terminal or depot in Kansas City, Kansas, and, in that event, as we held on our first hearing, such operation would not be a violation of the interstate permit. On this point, it appears that the Congress intended to leave to the states the exclusive right to control and supervise shipments between points in the same state, even though, by reason of an interstate routing, the property was given an interstate character. The last proviso of Subdivision (a) of Section 306, Title 49, U. S. C. A. is as follows:

"And provided further, that this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this chapter."

Quite obviously the Congress undertook to avoid controversies and disputes such as the one involved in this case. The Interstate Commerce Commission would exercise jurisdiction over such commerce only in those cases where the state authorities had failed to do so.

[fol. 80] The facts in this case are similar to *Sprout v. South Bend*, 277 U. S. 160, loc. cit. 168, where the court said:

"The legal character of this suburban bus traffic was not affected by the device of requiring the payment of a fare

fixed for some Michigan point or by Sprout's professing that he sought only passengers destined to that State. *The actual facts govern.* For this purpose, the destination intended by the passenger when he begins his journey and known to the carrier, determines the character of the commerce."

The testimony in support of the plaintiff tended to show that his depot or terminal in Kansas City, Kansas was in close proximity to a number of large shippers. The inference intended to be drawn was that it was because of these shippers that the terminal was located in Kansas City, Kansas and so close to the line between the states of Missouri and Kansas. It might be questioned, however, with a pickup and delivery zone with a radius of 25 miles, if the depot were so positioned as to accommodate heavy shippers whose factories and places of business were nearby.

Plaintiff's pickup zone at Kansas City, Kansas was so laid out as to cover Kansas City, Missouri. By this device, the plaintiff could carry all the intrastate shipments between St. Louis and Kansas City and extend to the shippers an interstate rate far below the tariffs for purely intrastate hauls. The arrangement could not be justified upon a theory that it was a usual and regular route, as in the case of *Mo. Pac. Railroad Co. v. Stroud*, 267 U. S. 404, where the court upheld a shipment between points in Missouri as interstate commerce for the reason "that the usual and regular way [fol. 81] of routing cars loaded with lumber at Oxy and consigned to St. Louis would be over the latter route through the State of Illinois and would be interstate commerce."

3. It is a matter worthy of comment that the plaintiff accepted a license from the Public Service Commission which specifically forbade that he should haul property between points in Missouri. The Public Service Commission had promulgated a rule which prohibited the transportation of merchandise between points in Missouri under interstate permits. Such acceptance was a voluntary act on the part of the plaintiff. He had his choice, either to refrain from hauling merchandise and property between points in Missouri under his interstate permit, or to secure a certificate of convenience and necessity as an intrastate carrier. He was not under the compulsion mentioned in *Union Pacific R. R. Co. v. Public Service Commission of Missouri*, 248

U. S. 67, where the court said that the carrier company was compelled to take out a license or a certificate under the menace of a penalty which meant irreparable loss. The court decided that the complainant's act in accepting the terms of the certificate was not voluntary.

As said in *Pullman Company v. Kansas*, 216 U. S. 56, loc. cit. 66, "by accepting the privilege it has voluntarily consented to be bound by the condition."

This principle was upheld in *Pierce Oil Corp. v. Phoenix Refg. Co.*, 259 U. S. 125.

Plaintiff would therefore have no right to challenge the validity of the said Rule No. 44.

[fol. 82] 4. The defendant has filed a supplemental pleading wherein there is a prayer for an accounting of fees accumulated during the operations of the plaintiff since the granting of the original restraining order, December 31, 1936.

While the injunction granted by this court prohibited the defendant Public Service Commission from revoking and cancelling plaintiff's permit as an interstate carrier, such injunction in nowise relieved the plaintiff of the obligation to pay statutory or prescribed license fees. No reason appears why such payments should not have been made. On the contrary, there is every reason why the plaintiff in a proceeding in equity should not meet all of the reasonable exactions of the state as condition precedent to the operations carried on by him.

Under Equity Rule 30, a defendant has a right to interpose a counter-claim "arising out of the transaction which is the subject-matter of the suit." It is doubtful whether these claims arose out of the transaction which is the subject matter of the suit, and, yet because of the injunction, the plaintiff elected to discontinue the payment of fees.

No objection having been made to the filing of the counterclaim, this court will not interpose one under the circumstances of the case. The question having been presented, it should be considered by us.

In *Piedmont & N. Ry. Co. v. Query*, 56 F. (2d), 172, loc. cit. 175, the court said in discussing similar questions:

[fol. 83] "And if either of these is a substantial question under the Constitution, we must proceed with the considera-

tion of the other questions presented; for in such case the jurisdiction of the court extends to every question involved, whether of federal or state law, even though the court may not find it necessary to decide the federal question."

In *Sovereign Camp, W. O. W. v. Murphy*, 17 F. S. 650, l. c. 652, a case like this heard before three judges sitting in the Southern District of Iowa, the court said:

"But the duty imposed on the three-judge court carries with it the duty on the part of the same three-judge court to try the whole case. The parties cannot be relegated to piecemeal trials of the several issues joined by them in their case."

The same principle was announced in *Greene v. Louisville Railroad*, 244 U. S. 499, loc. cit. 508, where the court said that:

"The jurisdiction of that court extended, and ours on appeal extends, to the determination of all question involved in the case, including questions of state law, irrespective of the disposition that may be made of the federal question, or whether it be found necessary to decide it at all."

In view of the above, unless the parties can agree after an inspection of the records upon the amount of the accumulated fees, it will be necessary to appoint a master to take an accounting and make his report to the court.

The injunction heretofore granted will be dissolved. The parties will be given thirty days from the filing of this opinion to agree upon the amount of the accumulated fees due under the counterclaim. If such agreement is not made within that time or within an extension for that purpose granted within that time, a decree will be entered dissolving [fol. 84] the temporary injunction, refusing the permanent injunction and appointing a special master to determine the amount of fees payable under the counterclaim.

If such agreement as to fees is reached within the time above allowed, a decree will be entered dissolving the temporary injunction, refusing the permanent injunction, dismissing the bill upon its merits and awarding recovery upon the counterclaim for the amount so agree upon.

**FINDINGS OF FACT**

The court finds from the evidence in the case :

1. That the carriage of property from St. Louis, Missouri, to Kansas City, Kansas, and thence back into Kansas City, Missouri, for delivery, was not the normal, regular, or usual route for shipping merchandise or property between St. Louis and Kansas City, Missouri.

2. That the terminal or depot used by the plaintiff in Kansas City, Kansas was approximately one-half mile from the Missouri State Line by a used traffic-way between Kansas City, Missouri, and Kansas City, Kansas.

3. That the route used by the plaintiff from St. Louis, Missouri, to his depot or terminal in Kansas City, Kansas, was through Kansas City, Missouri, and that the same traffic-ways were used in making deliveries of merchandise or property after same had been hauled in the first instance to the terminal in Kansas City, Kansas, and that such deliveries in-[fol. 85] volved a retracing in part of the identical routes.

4. That, after reaching the terminal or depot in Kansas City, Kansas, plaintiff in many instances did not unload the merchandise, but used the same trailer employed in making the carriage from St. Louis, and hauled said property back over the identical route used in going to his depot in Kansas City, Kansas, in making deliveries in Kansas City, Missouri, and North Kansas City, Missouri.

5. That a considerable portion of the operations carried on by plaintiff was in hauling property or merchandise between St. Louis, Missouri, and Kansas City, Missouri, and that much of such shipments was in carload lots, and that the method employed by the plaintiff was to haul such merchandise or property to his depot or terminal in Kansas City, Kansas, where a new driver, either with the same tractor and trailer, or with another tractor and the same trailer, would return the merchandise to Kansas City, Missouri.

6. That, in some instances, merchandise or property shipped between St. Louis and Kansas City was actually unloaded at the depot in Kansas City, Kansas, and then distributed to the consignees in Kansas City, Missouri. This, however, was a negligible percentage of the shipment between Missouri points.

7. That, prior to April 1, 1936, deliveries from the Kansas City, Kansas, depot to points in Missouri were made by an independent agency, but that subsequent to said date, such [fol. 86] deliveries were made by plaintiff and are now being made by him.

8. That the rates for interstate carriage between St. Louis, Missouri, and Kansas City, Kansas, were much lower than intrastate transportation tariffs between St. Louis, Missouri, and Kansas City, Missouri, and that the expense of delivery from the Kansas City, Kansas depot was not as great as the difference in tariffs.

9. That the method of operation employed by the plaintiff was designed and intended to afford shippers the benefit of a lower rate, and that the transportation service rendered by him between St. Louis, Missouri, and Kansas City, Kansas, was not in good faith.

10. That the plaintiff voluntarily accepted an interstate permit with such terms and conditions as prohibited him from hauling merchandise between points in Missouri, and that permitted him only to carry property in interstate commerce between points in Missouri and points in other states and from points in other states to points in Missouri.

11. That the license fees and other charges made by the State of Missouri against the plaintiff for the use of the highways of the State of Missouri as an interstate motor carrier during the time the restraining order and temporary injunction of this court have been in force have accumulated, but have not been paid by the plaintiff although the injuc-tive relief sought by him did not relieve him, nor was it intended to relieve him, of the obligation to pay such fees and charges, nor did he seek to be relieved of such fees and charges.

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[fol. 87] The court makes the following

### CONCLUSIONS OF LAW

#### I

That the act of the Public Service Commission in Missouri in cancelling and revoking plaintiff's permit as an interstate carrier was a valid and a constitutional exercise of its power.

## II

That the plaintiff had violated the express terms of its interstate permit.

## III

That the plaintiff has no right to challenge the constitutional validity of Rule Number 44 promulgated by the Public Service Commission.

## IV

That the plaintiff is indebted to the State of Missouri for license fees and charges accumulated since the granting of a temporary restraining order in this case, and the state is entitled to judgment therefor.

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[fol. 88] IN UNITED STATES DISTRICT COURT

Before Stone, Circuit Judge, and Reeves and Otis, District Judges

SEPARATE OPINION—Filed March 24, 1938

STONE, Circuit Judge, Separate Opinion:

I concur in the findings of fact and conclusions of law stated by Judge Reeves. I concur in much of his opinion. I desire to add a thought mainly concerned with the construction to be given to a portion of Section 303(1) of the Motor Carrier Act, 1935.

Plaintiff seeks to enjoin revocation of a permit or license issued him by the proper Missouri authorities, to operate trucks over Missouri highways in interstate commerce. At the time this permit was granted, the grant was subject to Rule 44 of the Missouri authorities which forbade such licensed interstate carriers to "accept for transportation within this State any . . . property known to be [fol. 89] destined to a point within the State of Missouri." Unless the limitation of this Rule was void as to plaintiff when the permit was issued or has become so since, it is clear that he has violated the permit and his permit or license is subject to revocation.

It seems to me this limitation was and is valid as applied to this plaintiff and as to his transactions here involved. That

this regulation affects interstate commerce is clear. Whether it is invalid depends upon whether the regulation unduly affects—burdens—interstate commerce or unduly discriminates against such commerce. This rule of law is of years standing and is declared in numerous decisions of the Supreme Court. The difficulty is not with statement of the rule but with its application to specific situations.

Rule 44 is not per se discriminatory against interstate commerce. In some instances it might be, in others it might not be. Therefore, the problem as to discrimination depends upon the facts of the particular situation.

Rule 44 had a good purpose, namely, to prevent intrastate commerce being carried on under the guise of interstate commerce and thus fraudulently removing such from the regulation and control of the State. Truck and bus transportation is peculiarly liable to such abuse. Other transportation is not because it depends upon fixed physical equipment.

Another consideration is that the highways are built, maintained and belong to the State. Necessarily, the State has a large measure of control over the use of those highways.

[fol. 90] It seems clear that this Rule would be valid, absent Congressional action, even though it "materially affected" interstate commerce (*S. C. State H. Dept. vs. Barnwell Bros.*, U. S. (decided February 14, 1938), p. 6). Is the "Motor Carrier Act, 1935" such Congressional action as to render it invalid? I think not.

It is true that that Act (Section 303 (1)) defines interstate commerce as including commerce "between places in the same state through another state", but Section 302(c) declares that "nothing in this chapter shall be construed . . . to authorize a motor carrier to do an intrastate business on the highways of any state, or to interfere with the exclusive exercise by each state of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

It seems to me that to give full force to these two provisions we should construe the word "through" as used in Section 303 not to include a situation where the carriage is merely over a state line and immediately back again for final delivery. "Through" is a word of common meaning. Primarily, it means "from one end or side to the other" (*Webster's New International Dictionary*). Although the word may have a more restricted meaning, if the text compels such construction, yet it is difficult to conceive a trip

from St. Louis, Missouri, across the State of Missouri, through Kansas City, Missouri, and a half mile into Kansas City, Kansas, with an early return to Kansas City, Missouri, by the same route, as being described as "through" Kansas. If it can be, then much of the power of state regulation over what is in true essence intrastate commerce can be taken [fol. 91] away merely through the subterfuge of darting across a state line and back again. I think this word "through" should be construed to cover only the situations where an ordinary and proper course of travel along a highway between the point of origin and the point of destination of a shipment would naturally result in a carriage across a state line and back again. If there is a choice of natural routes between the above points—one interstate and one intrastate—the carrier may use either and such use will determine the character of the shipment (interstate or intrastate) and the motive in making such choice is immaterial. But where the movement is merely to loop over a state line and back in an entirely unnecessary and abnormal movement, I think it should not be said that the shipment has passed "through" the other state within the meaning of the Motor Carrier Act. When we remember the relation of the state to the highways; the vast network of interlacing highways throughout the country; the number of cities at or near state lines; and the facility with which trucks and buses can cross state lines by deviation of only a few miles and thus divert what is really and truly an intrastate carriage into an interstate carriage, I think we should not construe the Act as including within interstate commerce every truck and bus that crosses a state line no matter how trivial or for what purpose.

Applying the above thoughts to the situation here we find a considerable business being done by this trucking company which is essentially an intrastate business. The feature relied upon to make it interstate business is that it [fol. 92] goes about a half mile beyond the Missouri-Kansas line and then is brought promptly back into Missouri—by the same or practically the same route used when it crossed over the state line. This is done under the guise of a "delivery service". That service extending for at least twenty-four miles into Missouri and including within that radius all of Kansas City, Missouri, North Kansas City and some miles into Clay and Jackson Counties, Mis-

souri—in short, the entire commercial and industrial territory of Kansas City, Missouri, and vicinity.

If this can be done, it seems to me it must be by ignoring the usual meaning of the word “through” and in violation of the statutory injunction that “nothing in this chapter shall be construed . . . to authorize a motor carrier to do an intrastate business on the highways of any state, or to interfere with the exclusive exercise by each state of the power of regulation of intrastate commerce by motor carriers on the highways thereof.”

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[fol. 93] IN UNITED STATES DISTRICT COURT

DISSENTING OPINION—Filed March 24, 1938

OTIS, District Judge, Dissenting:

I regret exceedingly my inability to concur with my learned colleagues in the disposition of this case. I can not concur even in the Findings of Fact. Quite probably I am wrong, quite probably my colleagues are entirely right. I would not set out my views at all except that I do not wish hereafter to be understood as having concurred in ideas with which I cannot agree. I shall sign the decree, of course, since, when determined upon by the majority of the Court, it is the decree of the Court, and since I understand it is the proper practice for a dissenting judge to join in the decree.

1. After the hearing upon plaintiff's application for a [fol. 94] temporary injunction this court handed down its unanimous per curiam opinion and made Findings of Fact. The evidence received at that hearing substantially was the same as that given on final hearing. Then we unanimously were of the opinion that an injunction should issue. Since the Findings of Fact which we made then best describe (except in one trifling particular which will be indicated hereafter) the true character of plaintiff's business and the manner and method of his operation, I repeat them in haec verba here.

1. The plaintiff transports freight by automobile trucks as a common carrier between freight terminals or depots located in St. Louis, Missouri, Kansas City, Kansas,

Wichita, Kansas, Des Moines, Iowa, and Burlington, Iowa. By far the largest part of its business consists of the transportation of goods from points in one state to points in other states. A small percentage of its business (approximately 5%) consists in the transportation of goods from points in Missouri to other points in Missouri, chiefly from Kansas City, Missouri, to St. Louis, Missouri, and from St. Louis, Missouri, to Kansas City, Missouri.

2. At St. Louis, Missouri (and so also at each of the cities at which plaintiff has a terminal or depot) the plaintiff renders to its patrons a so-called "pick-up" service. This service it renders to all its patrons, living within a circle having a radius of twenty-five miles, the center of which is at the plaintiff's terminal or depot. The plaintiff picks up at the place of business of a patron the consignment he desires to have transported, carries that consignment to the terminal or depot, unloads it on a dock there situated, thence it is loaded on a line truck and by that line truck transported to some other of the plaintiff's terminals or depots. It is unloaded from the line truck at the terminal or depot of its destination. At that terminal or depot, as at each other [fol. 95] of plaintiff's terminals or depots, a "delivery service" is rendered by plaintiff. Plaintiff causes the shipment to be loaded on to a delivery truck and by that truck carried to the place of business of the consignee. This "delivery service", like the "pick-up" service, is rendered to patrons of the plaintiff living within a circle having a twenty-five mile radius, the center of which is the terminal or depot of the plaintiff. Since the St. Louis "pick-up" service area of the plaintiff, the center of which is the St. Louis, Missouri, terminal of the plaintiff, necessarily includes a part of Missouri, and since the Kansas City, Kansas "delivery" area, the center of which is at the plaintiff's terminal in Kansas City, Kansas, necessarily also includes a part of Missouri, some consignments will be from consignors whose places of business are in Missouri to consignees whose places of business also are in Missouri. All consignments, however, from the St. Louis, Missouri "pick-up" area to the Kansas City, Kansas, "delivery" area are transported in due and regular course of plaintiff's business (and necessarily are so transported) from plaintiff's terminal or depot in St. Louis, Missouri, to plaintiff's terminal or depot in Kansas City, Kansas. So also as to consign-

ments from the Kansas City, Kansas, "pick-up" area to the St. Louis, Missouri "delivery" area.

3. Conforming with laws enacted by Congress plaintiff has filed with the Interstate Commerce Commission schedules of its rates for the transportation of freight and full information touching the points between which it carries freight, and in connection with each of these points a full statement as to the "pick-up" and "delivery" service there rendered and the areas within which that service is rendered, all of which it is required to do by laws enacted by Congress. The plaintiff carries no freight except in accordance with its freight rates on file with the Interstate Commerce Commission. Plaintiff carries no freight between any points in Missouri save and except that which in the usual and regular course of its business it carries from a terminal in one state to a terminal in another state.

[fol. 96] The evidence received at the final hearing would justify a finding that it was 10% rather than 5% of plaintiff's business which originated in Missouri and was destined for consignees in Missouri. Such trifling difference, however, justifies no difference in the conclusions reached. Beyond any possibility of controversy, in my judgment, every part of plaintiff's business is interstate commerce. While Missouri, in the absence of Congressional occupancy of a particular field may so legislate as to affect interstate commerce (as by regulating the size of trucks, prescribing particular routes to be traversed by them, regulating the speed at which they may travel) Missouri has no power whatever, directly or indirectly, by refusal to grant a permit or by conditioning a permit granted, to prevent and prohibit interstate commerce in a single pound of freight. But that is what the Public Service Commission is endeavoring to do here. We enjoined it temporarily. We should enjoin it permanently.

In none of the formal conclusions of law announced by the majority is it ruled that any part of the carriage of freight by plaintiff is not interstate commerce. The mere fact that freight is put on board a truck in Missouri and is delivered in Missouri certainly does not make the transportation of that freight the less interstate commerce, if a state line is crossed in its transportation. *Mo. Pac. R. Co. v. Stroud*, 267 U. S. 404. It is suggested, however, in the

[fol. 97] opinions of the majority, that occasionally the plaintiff would carry a whole truckload of freight from a consignor in St. Louis, Missouri, to a consignee in Kansas City, Missouri, that that truckload would be carried directly past its Missouri destination over a given route to plaintiff's Kansas City, Kansas terminal, that the truck then would be turned around, perhaps with a change of tractor and a change of driver, driven back over the same given route to the consignee's place of business in Missouri, which it had passed an hour or two before. My colleagues think that that would be mere subterfuge and evasion. If that were all, I should think so too. But I do not think it would not involve interstate commerce. Such a movement would in reality be two movements, not one continuous movement, but two movements, one intra-state, the other interstate. That one of these two movements which is wholly intra-state the state may prohibit. That movement does not become interstate because an entirely independent and useless interstate movement is superimposed upon it.

But the suppositions case is not this case. I do not think the evidence in this case indicates that there ever was a single such instance in the transportation carried on by plaintiff. The evidence does indicate that occasionally, very rarely, plaintiff will carry an entire truckload of freight consigned in St. Louis, Missouri, to a consignee in Kansas [fol. 98] City, Missouri. That truck will travel over plaintiff's usual and normal route to the terminal in Kansas City, Kansas. At the terminal that truck is turned over by the driver and its load is checked but it is not unloaded and the load put in another truck, which would be a foolish and wasteful thing to do. A new tractor is attached to the same truck and with a different driver the truck is taken with its load to the consignee in Missouri. There is no evidence that that consignee ever would be on the identical road over which the truck previously had passed. In any event, that truckload must be dealt with at the terminal. There the freight must be checked and the driver relieved from further responsibility. It is not usual for freight to be thrown off a train between stations although the consignee lives between them.

As I understand the views of my colleagues, they believe there is a distinction between (a) carrying some freight from a point in Missouri to a point in Missouri as a part of a truckload (which, of course, must be separated at the

terminal from other freight in that truckload) and (b) carrying other freight from a point in Missouri to a point in Missouri, which, because it fills a truck, requires no separation at the terminal from other freight and requires no transfer from one truck to another. Carriage of character (a), my colleagues think, is interstate commerce, while carriage of character (b) is intrastate. I cannot agree that [fol. 99] the slight and altogether reasonable differences in these two methods of handling freight possibly can affect the character of the commerce involved in either. It is entirely possible that I have interpreted incorrectly the views of my colleagues.

In the separate concurring opinion of Judge Stone special emphasis is placed upon Rule 44 prescribed by the Public Service Commission. Since that rule is not set out in its precise terms in either of the opinions of my colleagues I set it out. It is as follows:

“No driver or operator operating under an interstate permit shall accept for transportation within this state any person or property known to be destined to a point within the State of Missouri. If such interstate carrier accepts within Missouri a passenger whose destination is beyond the limits of the State of Missouri, such passenger shall not be permitted to terminate the trip within the State of Missouri; and if such interstate carrier accepts within Missouri property destined to a point beyond the limits of the State of Missouri such property shall not be terminated within the State of Missouri.”

It seems to me this rule cannot reasonably be interpreted to apply to plaintiff's operation. It will not be so interpreted if the whole rule is read together. The second sentence of the rule makes clear what is meant by the first sentence of the rule.

It is provided in the first sentence of the rule that “No driver or operator operating under an interstate permit shall accept for transportation within this state any person or property known to be destined to a point within the State of Missouri.” But it is clear from the second sentence [fol. 100] that what is aimed at in the first sentence is a transportation of persons or property which is wholly within the state on a contract to transport beyond the state. That, at least, is a reasonable interpretation and it is the

only interpretation consistent with constitutional principles.

Plaintiff's operation which the Public Service Commission attacks either is interstate commerce or it is not interstate commerce. If it is not interstate commerce of course the state can prevent it for plaintiff has authority to engage only in interstate commerce. The only purpose of any reference to Rule 44 in this case is on the theory that plaintiff's operation is interstate commerce of such a character as violates Rule 44 and that Rule 44, if construed to apply to that operation, is a valid rule. I have said that the rule should not be interpreted to apply to plaintiff's operation. I now say that if so interpreted it has no validity whatever.

Whence did the Public Service Commission derive any authority to adopt Rule 44? Undoubtedly from Section 5267 (b) R. S. Mo. 1929, as amended, where it is set out that—"The Public Service Commission shall have power and authority by general order or otherwise to prescribe rules and regulations governing all motor carriers." But into that statute must be read the implied provision that no such rule or regulation may violate the federal Constitution. Given a rule or regulation, no such construction should [fol. 101] be placed upon it as will make it violative of the federal Constitution.

Judge Stone believes that even although Rule 44 is interpreted to apply to plaintiff's operation (and the Public Service Commission has so interpreted it), nevertheless it may be valid, that it only "affects" interstate commerce. It is at that point that I find myself unable to concur with my learned colleague. As now interpreted the rule does not "affect" interstate commerce, it prohibits it. Note the very language of the rule: "No driver or operator operating under an interstate permit shall accept for transportation within this state any person or property known to be destined to a point within the State of Missouri." I may be utterly in error, but certainly it is my view that no state can prohibit, by any method, interstate commerce in any subject of legitimate commerce. No state can do that whether or not Congress has legislated in the field.

Even in the field of regulations which do not prohibit but only affect interstate commerce the power of the state vanishes when once Congress has assumed jurisdiction and has legislated. Exactly that is the situation here. Congress

has legislated in the field of transportation in interstate commerce by motor vehicles. Motor Carrier Act 1935. Section 303(1) of that Act defines interstate commerce so as to include commerce "between places in the same state [fol. 102] through another state." My learned colleague believes that the word "through" in the Congressional definition (which was but the restatement of several decisions of the Supreme Court) does not describe "a situation where the carriage is merely over a state line and immediately back again for final delivery." The definition from Webster's Dictionary is set out, indicating that the primary meaning of "through" is, "from one end or side to another." But if that primary meaning is the meaning here, the word certainly was misused.

I think the meaning is that in which the word "through" was used by Mr. Justice Holmes in *Western Union Telegraph Co. v. Speight*, 254 U. S. 17. In that case a telegraphic message originated in North Carolina and was for transmission to a point in the same state. It was so routed as to pass through a part of Virginia. It was found as a fact that that routing was "for the purpose of fraudulently evading liability under the law of North Carolina." Mr. Justice Holmes said: "The transmission of a message *through* two states is interstate commerce as a matter of fact. The fact must be tested by the actual transmission." Again he said: "The court below \* \* \* held that when as here the termini were in the same state the business was intrastate *unless it was necessary to cross the territory of another state* in order to reach the final point. This \* \* \* is not the law."

[fol. 103] It seems to me that the word "through," as used by Congress, cannot be limited in its meaning to a more or less extensive carriage through another state (who will determine the minimum carriage which will amount to carriage "through" another state?). Certainly it should not depend upon the purpose in the carrier's mind. As in *Telegraph Co. v. Speight* and in *Mo. P. R. Co. v. Stroud*, supra, it should depend upon the fact, upon whether a state line is crossed. If the purpose is evasion of state law, of what significance is that? As the zone of state law is passed the zone of federal law is entered. There is no "no man's land" between these zones where lawlessness obtains.

My colleague forcibly says that there is danger "that what is in true essence intra-state commerce can be taken

away merely through the subterfuge of darting across a state line and back again." But the evidence in this case does not disclose a mere darting across a state line and back again. It does not record a single instance of that kind. And if it did, it would not be in its "essence" intra-state commerce, if the movement is a single movement. How can any movement be wholly intra (within a) state which crosses a state line?

2. Defendants have asked leave to file a counterclaim. The plaintiff, it is alleged, owes the state fees for the use of the highways which fees it has not paid. It is sought to recover them by this counterclaim. There are two reasons why I think the counterclaim should not be permitted to [fol. 104] be filed, although I have little doubt that the fees sought are owing.

Equity Rule 30 authorizes (1) a "counterclaim arising out of the transaction which is the subject matter of the suit." Also it authorizes (2) a "counterclaim against the plaintiff which might be the subject of an independent suit in equity against him." Two classes of counterclaims are thus provided for. *Moore v. Cotton Exchange Co.*, 270 U. S. 593. But obviously the counterclaim sought to be asserted here does not fall in class (2); it could not be made the subject of an independent suit in equity. (It might be made the subject of a suit at law.) Does it arise out of the transaction which is the subject matter of the suit?

It is said in the opinion of the majority that it is doubtful if this counterclaim "arose out of the transaction which is the subject matter of the suit." I should go further in the same direction and say that it is certain the counterclaim does not arise out of the same transaction. What was "the transaction" which is the subject matter of this suit?

The Public Service Commission revoked or threatened to revoke the plaintiff's interstate permit and threatened then to prevent plaintiff operating without an interstate permit. The suit arises out of the withdrawal or threatened withdrawal of the permit and consequence incident to that withdrawal. The right to fees arises out of the use of the state's [fol. 105] highways by plaintiff. Certainly the (a) withdrawal of the right to use the highways and (b) the use of the highways are not the same thing, not the same transaction. They are scarcely comparable but, if comparable, they are not comparable as resembling one another but as opposites.

It is true that the plaintiff is operating under our temporary injunction. Because he is operating he owes fees. It may be said then that the counterclaim arises because of the injunction and that the injunction arose from the threatened withdrawal of the interstate permit. That, however, is a connection quite remote between counterclaim and "transaction" and not the immediate connection which the rule requires.

My second reason for believing this counter claim should not be entertained is this. If plaintiff owes fees for the use of the highways of the state he owes them to the state or to the state treasurer for the state. Sec. 5275, R. S. Mo. 1929. He does not owe them to the Public Service Commission whose members are the defendants in this case. Nor have I found any statute authorizing the Commission to sue for such fees as the agent of the state.

3. In my view a permanent injunction should issue and leave to file the counterclaim should be denied.

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[fol. 106] IN UNITED STATES DISTRICT COURT

PETITION OF PLAINTIFF FOR REHEARING—Filed April 21, 1938

Now comes Frank Eichholz, plaintiff in the above-entitled cause, and respectfully prays that said cause be reheard and reconsidered, for the following reasons:

1. Because there is no evidence in the case from which the court could find that the carriage of property between St. Louis, Missouri, and Kansas City, Missouri, by way of its terminal in Kansas City, Kansas, is not the normal, regular or usual route for transporting such merchandise, in the face of the undisputed evidence in the record that the only terminals, depots, or other facilities for checking, weighing, inspecting, loading, unloading, or otherwise clearing shipments in question which plaintiff now has or ever had are located respectively in St. Louis, Missouri, and Kansas City, Kansas.

2. Because the order of the Public Service Commission revoking plaintiff's interstate permit prohibits the transaction of 90 percent of his total business from his St. Louis, Missouri, terminal which is concededly interstate commerce, and amounts to a prohibition of interstate commerce and

lays an undue burden thereon in violation of Sec. 8, Art. I of the Constitution of the United States.

3. Because the court erred in its conclusion of law that the plaintiff has no right to challenge the constitutional validity of Rule Number 44 promulgated by the Public Service Commission, since said rule, as interpreted by this court, results in conferring upon the Public Service Commission power and authority to prohibit interstate commerce, in violation of Sec. 8, Art. I of the Constitution of the United [fol. 107] States, and in violation of Sec. I of the Fourteenth Amendment to said Constitution.

4. Because the court erred in finding of fact #10, insofar as it infers that plaintiff voluntarily agreed to the revocation of his permit for acts performed in good faith and growing out of circumstances justiciable in their nature. Such a condition places the burden upon plaintiff to decide, at his peril, such judicial points and questions as are involved in this action.

5. Because the court erred in its conclusion of law that the act of the Public Service Commission in cancelling and revoking plaintiff's permit as an interstate carrier was a valid and constitutional exercise of its power, since the result of such conclusion would be to confer power upon said Commission to prohibit all interstate commerce by plaintiff contrary to Sec. 8, Art. I of the Federal Constitution, and in violation of his rights under the Sec. I of the 14th Amendment to Constitution.

6. Because the court erred in its conclusion of law that the plaintiff has violated the express terms of its interstate permit, since under Sec. 8, Art. I of the Federal Constitution, the Public Service Commission is without power to prohibit all interstate commerce by plaintiff, because of alleged violations.

7. Because, in its conclusion of law respecting any indebtedness for license fees or other charges due from this plaintiff to the State of Missouri, the court erred in the following respects:

[fol. 108] (a) Such conclusion must necessarily be predicated upon the premise that in an independent action for the recovery of such fees and charges, defendants are the

proper parties plaintiff; whereas under Laws of Missouri, 1931, p. 313, sec. 5272(d), such cause of action can be maintained only at the relation of the State Treasurer of the State of Missouri.

(b) The counterclaim fails in every respect to conform to the nature of counterclaims permissible under Federal Equity Rule No. 30.

(c) The record fails to show a ruling upon the objection of plaintiff to filing of the proffered counterclaim, but shows only that same was deposited with the Clerk with reservation of a ruling upon the propriety of filing same.

(d) The Laws of Missouri, 1931, p. 311, sec. 5272(a) are such as substantially make the issuance of a permit a condition precedent to collection of such fees and charges.

8. Because the court erred in finding as a fact that fees and other charges for the use of the highways of Missouri have accumulated and not been paid by plaintiff, in the face of the statutory provisions making the issuance of a license substantially a condition precedent to the payment of any such fees or charges.

9. Because the evidence does not tend to show that a "considerable portion" of the operations carried on by plaintiff are in hauling merchandise between St. Louis, Missouri, and Kansas City, Missouri, and that "much" of such shipments are in carload lots, and that, in such cases, all that is done at the Kansas City, Kansas, terminal is to change drivers, or, in some instances, the tractor, before [fol. 109] returning the merchandise to Kansas City, Missouri. On the contrary, the evidence shows that, from the nature of plaintiff's business, entry into the terminal at Kansas City, Kansas, was necessary in order to perform the essential transactions of checking, weighing, inspecting, making C.O.D. collections, and otherwise clearing shipments before delivery to the ultimate consignee.

10. Because there is no evidence in the case from which the court could find that only a negligible percentage of the shipments between Missouri points is unloaded at the Kansas City, Kansas terminal and then distributed to the consignee in Kansas City, Missouri. On the contrary, the uncontroverted evidence on this point was that only an

occasional shipment consigned to a point in Missouri was not unloaded at the terminal.

11. Because the evidence does not tend to show that the method of operation employed by the plaintiff is designed and intended to afford shippers the benefit of a lower rate, and because there is no evidence from which the court could find that the transportation service rendered by plaintiff between St. Louis, Missouri, and Kansas City, Kansas, is not in good faith.

12. Because there is no evidence in the case from which the court could find that the same trafficways used by plaintiff's trucks in transporting merchandise between its terminals in St. Louis, Missouri, and Kansas City, Kansas, are always used in making pickups from and deliveries into Kansas City, Missouri, in the face of evidence which shows that trafficways or streets thus used depended upon the ultimate destination of particular shipments in Missouri.

[fol. 110] 13. Because the evidence does not tend to show that, after reaching its terminal in Kansas City, Kansas, plaintiff "in many instances" does not unload the merchandise, but uses the same trailer employed in making the carriage from St. Louis, and hauls said property back over the identical route used in going to his terminal in Kansas City, Kansas, in making deliveries in Kansas City, Missouri.

The foregoing are some of the errors of fact and law into which the court has been led in its consideration of this case. Not only will these errors be plainly apparent upon a further consideration of the case, but such a reconsideration will show that the facts as they actually exist afford no basis for any such application of the law as that made by the court.

Petitioner prays, for the reasons herein set forth, that the decree of the court be withheld, and the cause reheard and reconsidered.

Respectfully submitted, D. D. McDonald, Frank E. Atwood, Smith B. Atwood, Counsel for Petitioner.

We hereby certify that the foregoing petition is, in our opinion, well founded in law and should be granted, and is not interposed for delay.

D. D. McDonald, Frank E. Atwood, Smith B. Atwood,  
Counsel for Petitioner.

[fol. 111] IN UNITED STATES DISTRICT COURT

ORDER DENYING PETITION FOR REHEARING—Filed May 10, 1938

Petition denied and exception asked and allowed this 9th day of May, 1938.

Kimbrough Stone, Circuit Judge. Albert L. Reeves,  
District Judge. Merrill E. Otis, District Judge.

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[fol. 112] IN UNITED STATES DISTRICT COURT

DECREE—Filed May 10, 1938

This cause came on to be further heard. This time on the merits of the case. The plaintiff appeared in person and by counsel, and the defendants appeared by counsel. Evidence for plaintiff and defendants was adduced upon the issues made by the pleadings, and the cause was argued by counsel.

Thereupon the said cause was taken under advisement by the court, and briefs were submitted to aid the court in the consideration thereof; and thereupon, and upon consideration thereof, it is Ordered, Adjudged, and Decreed by the court as follows:

That the plaintiff is not entitled to a permanent injunction against the defendants;

That the defendants validly revoked the permit heretofore granted to the plaintiff as an interstate carrier over the highways of the State of Missouri;

That the temporary injunction heretofore granted to the plaintiff by this court against the defendants should be, and the same hereby is dissolved;

That the defendants are entitled to recover on their counterclaim from the plaintiff on behalf of the State of Missouri certain license fees and other charges accruing during the pendency of this suit and the effective period of the temporary injunction; and,

That Jay M. Lee . . . , Esq., of Kansas City, Missouri, be, and he hereby is appointed as special master to take an accounting of such accrued and accumulating license fees [fol. 113] and other legal charges, if any, and report same to this court with his findings of fact and conclusions of

law. And the court hereby reserves jurisdiction of the cause till all questions arising on the counterclaim have been determined.

Done at Kansas City, Missouri, this 9th day of May, 1938.

Kimbrough Stone, Senior United States Circuit Judge. Albert L. Reeves, United States District Judge. Merrill E. Otis, United States District Judge.

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[fol. 114] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed July 11, 1938

The Plaintiff, Frank Eichholz, conceiving himself aggrieved by the Order and Decree made and entered on the 10th day of May, 1938, in the above entitled cause, dissolving the temporary injunction, refusing the permanent injunction, and appointing a special master to determine the amount of fees payable under the counterclaim, does hereby appeal therefrom to the Supreme Court of the United States, for the reasons specified in the Assignment of Errors which is filed herewith, and he prays that this appeal may be allowed; that a citation be issued directly to the above named defendants, commanding them and each of them to appear before the Supreme Court of the United States, to do and receive what may appertain to justice to be done in the premises; and that a transcript of the record, proceedings and papers upon which said order and decree were made, be duly authenticated and sent to the Supreme Court of the United States.

Petitioner further prays that the amount of surety required of him on this appeal may be fixed by the order allowing this appeal.

Frank E. Eichholz, Plaintiff; D. D. McDonald, Frank E. Atwood, Smith B. Atwood, Counsel for Plaintiff.

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[fol. 115] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S ASSIGNMENT OF ERRORS—Filed July 11, 1938

Now comes Frank Eichholz, plaintiff herein, by his counsel, and, having prayed an appeal from the decree entered

in this cause on the 10th day of May, 1938, dissolving the temporary injunction, refusing the permanent injunction, and appointing a master to determine the amount of fees payable under the counterclaim, petition for re-hearing having been denied, respectfully shows that said decree is erroneous and should be reversed and set aside for the following reasons:

1. The court erred in its conclusion of law that the act of the Public Service Commission of Missouri, in cancelling and revoking plaintiff's permit as an interstate carrier was a valid and constitutional exercise of its powers.

2. The court erred in not finding as a conclusion of law that the transportation of freight from Kansas City, Missouri to St. Louis, Missouri, through plaintiff's terminals or depots in Kansas City, Kansas, and from St. Louis, Missouri to Kansas City, Missouri through plaintiff's terminals [fol. 116] or depots in Kansas City, Kansas, is transportation in interstate commerce within the definition of that term as found in the Motor Carrier Act of Congress, 1935, Sec. 203(a) (10).

3. The court erred in construing Rule 44 of the Public Service Commission of Missouri to apply to transportation of freight between Kansas City, Missouri, and St. Louis, Missouri, by way of plaintiff's terminal in Kansas City, Kansas.

4. The court erred in applying an express or implied definition of "interstate commerce" in Rule 44 of the Public Service Commission which conflicts with the definition of that term as found in the Motor Carriers Act of 1935, thus and thereby depriving plaintiff entirely of his right to engage in transportation of freight in interstate commerce over the highways of Missouri.

5. The court erred in finding that the method of operation employed by the plaintiff was designed and intended to afford shippers the benefit of a lower rate and that the transportation service rendered by him between St. Louis, Missouri and Kansas City, Kansas was not in good faith.

6. The court erred in failing to find as a material fact that plaintiff's entire business was set up and organized with the design, intent and purpose of engaging solely in interstate commerce, and that his terminal depot in the Kansas

City area was located in Kansas City, Kansas, before there was a lawfully established rate differential between interstate commerce and intrastate commerce.

7. The court erred in finding that a "considerable" portion of plaintiff's business was hauling property or merchandise between St. Louis, Missouri, and Kansas City, Missouri, and erred in failing to find as a material fact that by far the greater bulk (more than 90%) of the total freight carried by plaintiff was indisputably transported in interstate commerce between the States of Missouri, Kansas, [fol. 117] Iowa and Illinois, to transport which it was necessary to cross some parts of the territorial boundaries of Missouri.

8. The court erred in failing to find as a material fact that, as to the relatively small portion of plaintiff's freight claimed to be intrastate in character, it was necessary for plaintiff first to traverse the entire distance between his terminals or depots in Kansas City, Kansas and St. Louis, Missouri, in order to perform the necessary functions of weighing, loading, unloading, making out freight bills, checking, inspecting, making C. O. D. collections, relieving drivers, exchanging tractors and trailers, etc., prior to delivery to the consignee, having no facilities in Kansas City, Missouri for performing such functions.

9. The court erred in finding that the carriage of property from St. Louis, Missouri, to Kansas City, Kansas, and thence back into Kansas City, Missouri, for delivery was not the normal, regular or usual route (for plaintiff) in shipping merchandise between St. Louis, Missouri and Kansas City, Missouri.

10. The court erred in finding as a material fact in the case that the terminal or depot used by the plaintiff in Kansas City, Kansas, was approximately one-half mile from the Missouri State Line by a used traffic-way between Kansas City, Missouri and Kansas City, Kansas.

11. The court erred in finding as a material fact in the case that the route used by the plaintiff from St. Louis, Missouri, to his depot or terminal in Kansas City, Kansas, was through Kansas City, Missouri, and that the same traffic-ways were used in making deliveries of merchandise or property after same had been hauled in the first instance

to the terminal in Kansas City, Kansas, and that such deliveries involved a retracing in part of the identical route.

12. The court erred in finding as a material fact in the case that after reaching the terminal or depot in Kansas City, Kansas, plaintiff in many instances did not unload the merchandise, but used the same trailer employed in making [fol. 118] the carriage from St. Louis, and hauled said property back over the identical route used in going to his depot in Kansas City, Kansas, in making delivery in Kansas City, Missouri, and North Kansas City, Missouri.

13. The court erred in finding as material facts in the case that much of plaintiff's shipments were in carload lots, and that the method employed by him was to haul such merchandise or property to his depot or terminal in Kansas City, Kansas, where a new driver, either with the same tractor and trailer or with another tractor and the same trailer, would return the merchandise to Kansas City, Missouri.

14. The court erred in finding that the merchandise or property shipped between St. Louis, Missouri, and Kansas City, Missouri, that was actually unloaded at the depot in Kansas City, Kansas, constituted only a negligible percentage of plaintiff's shipments between Missouri points.

15. The court erred in finding as a material fact in the case that prior to April 1, 1936, deliveries from the Kansas City, Kansas, depot to points in Missouri were made by an independent agency, but that subsequent to said date, such deliveries were made by plaintiff and are now being made by him.

16. The court erred in finding as a material fact in the case that the rates for interstate carriage between St. Louis, Missouri, and Kansas City, Kansas, were much lower than intrastate transportation tariffs between St. Louis, Missouri, and Kansas City, Missouri, and that the expense of delivery from the Kansas City, Kansas depot was not as great as the difference in tariffs.

17. The court erred in not concluding, as a matter of law, (it appearing indisputably in evidence that in transporting the freight in controversy the plaintiff crossed state lines,) that such operations were interstate in character, within the purview and definition of the Motor Carrier Act, 1935.

18. The court erred in finding that plaintiff's acceptance of an interstate permit on conditions prohibiting him from [fols. 119-153] hauling merchandise between points in Missouri was voluntary, in-so-far as said fact infers that plaintiff voluntarily agreed to the revocation of his interstate permit for acts complained of in this cause.

19. The court erred in concluding as a matter of law that plaintiff has no right to challenge the constitutionality of Rule No. 44, promulgated by the Public Service Commission.

20. The court erred in its conclusion of law that plaintiff had violated the express terms of his interstate permit.

21. The court erred in not concluding as a matter of law that the counterclaim filed in this cause did not comply with Equity Rule No. 30, in that it does not arise out of the transaction which is the subject matter of the suit, and did not set up any claim against plaintiff which could be the subject of an independent suit in equity by any of the defendants.

22. The court erred in failing to conclude as a matter of law that, under the provisions of Section 5272(a) Laws of Missouri, 1931, Page 311, only the State Treasurer of Missouri is authorized to maintain an action for the recovery of license fees and charges due from, and remaining unpaid by, a holder of an interstate permit to engage in interstate commerce.

Wherefore, and in order that the foregoing Assignment of Errors may be and appear of record in this cause, Frank Eichholz, plaintiff herein, presents the same to this court, and prays that such disposition may be made thereof as is in accordance with the law and the statutes of the United States in such case made and provided; and plaintiff further prays that said final decree may be reversed and the court be directed to enter a decree in this cause in conformity with the prayer of the bill of complaint.

D. D. McDonald. Frank E. Atwood. Smith B. Atwood.

Dated at Jefferson City, Mo., this the 11th day of July, 1938.

[fol. 154] IN UNITED STATES DISTRICT COURT, CENTRAL DIVISION OF THE WESTERN DISTRICT OF MISSOURI

In Equity. No. 660

FRANK EICHHOLZ, Plaintiff,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, Roy McKittrick, Attorney-General of the State of Missouri, and B. M. Casteel, Superintendent, State Highway Patrol, Defendants.

ORDER ALLOWING APPEAL—Filed July 11, 1938

Plaintiff's petition for appeal filed herein having been taken up and considered, the court hereby orders that the same be allowed as prayed upon the filing of a bond in the amount of \$500.00 with approved surety.

Kimbrough Stone, U. S. Circuit Judge. Albert L. Reeves, U. S. District Judge. Merrill E. Otis, U. S. District Judge.

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[fols. 155-156] IN UNITED STATES DISTRICT COURT

ORDER APPROVING APPEAL BOND—Filed July 16, 1938

Now on this 16th day of July, 1938, is filed for record herein the appeal bond in the above entitled cause in the sum of Five Hundred (\$500.00) Dollars, with the National Surety Corporation, a corporation as surety.

The above bond approved this 15th day of July, 1938.

Merrill E. Otis, Judge.

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[fol. 157] IN UNITED STATES DISTRICT COURT

MOTION FOR ORDER APPROVING STATEMENT OF EVIDENCE—  
Filed August 3, 1938

Comes now, Frank Eichholz, plaintiff and appellant in this cause and shows to the court that at the time of the filing of his precipe herein under Equity Rule No. 75(a), namely, on July 11, 1938, he filed also his statement of the evidence to be included in the record herein, a copy of which

was served upon appellees as shown by their acknowledgment of service upon the original copy so filed.

That he has notified appellees of such lodgment, as shown by acknowledgment of service, a copy of which is attached to this motion, and that on the 13th day of August, 1938 at 10:00 A. M. or as soon thereafter as the same may be heard, appellant will present said statement for approval in open Court in Kansas City, Missouri, where and when they may present any objections, or proposed amendments thereto.

Wherefore, appellant moves the court to make an order approving his said statement, if the same be true, and if the same be not true, to give such directions as the court may seem proper in order to make it so, and approve the same, and make it a part of the record for the purposes of this appeal.

D. D. McDonald, Frank E. Atwood, Smith B. Atwood,  
Solicitors for Appellant.

Service of the within Motion is hereby acknowledged, this the 3rd day of August, 1938.

James H. Linton, Daniel C. Rogers, Solicitors for  
Appellees.

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[fol. 158] IN UNITED STATES DISTRICT COURT

#### NOTICE

Pursuant to Equity Rule 75(b) you are hereby notified that a statement of the evidence to be included in this case was filed by appellant with the clerk of this court on July 11, 1938, a copy of which statement has heretofore been served upon you as shown by your acknowledgment of service upon the original copy so filed.

Pursuant further to said Equity Rule 75(b) you are hereby notified that on Saturday, August 13, 1938, at 10:00 A. M. or as soon thereafter as the same may be heard, appellant will present said statement to this court for approval in open Court at Kansas City, Missouri, when and where you may present any objections or proposed amendments thereto; otherwise appellant will then and there move the court to approve said statement as filed and order the

same to become a part of the record for the purpose of the appeal herein.

D. D. McDonald, Frank E. Atwood, Smith B. Atwood,  
Solicitors for Appellant.

Service of the within notice is hereby acknowledged this 3rd day of August, 1938.

James H. Linton, Daniel C. Rogers, Solicitors for  
Appellees.

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[fol. 159] IN UNITED STATES DISTRICT COURT

STATEMENT OF THE EVIDENCE, WITH ACKNOWLEDGMENT OF  
SERVICE BY APPELLEES—Filed July 12, 1938

Frank Eichholz, the plaintiff and appellant in this case, is engaged in the trucking business under the name of Rite-way Motor Service. He has been in this business since about 1931, at which time no certificate or permit was required of motor carriers in Missouri. In 1932 he obtained an interstate contract hauler's permit from the Public Service Commission, pursuant to a statute then recently enacted, and operated under such permit until 1934. In 1934, upon application of appellant, his contract hauler permit was cancelled, and an interstate permit was issued in lieu thereof by the Public Service Commission, authorizing him to engage in interstate operations "from all points in Missouri to points beyond the State and from points beyond Missouri to all points within the State." He has never obtained or sought an intrastate permit from the Commission.

As a necessary part of such trucking business, appellant has established and still maintains terminals or depots at St. Louis, Missouri, Kansas City, Kansas, Wichita, Kansas, Des Moines, Iowa and Burlington, Iowa. Between these terminals or depots he operates about 30 line-haul or road [fol. 160] trucks, of the tractor-trailer type having about a ten ton capacity. At each of these terminals appellant provides a "pick-up" and "delivery" service to his customers located within a 25 mile radius of the terminal. Shipments of goods are brought to the terminals on small trucks having a maximum capacity of two or three tons. Employees at the terminal unload this freight on the terminal docks, check, sort and classify it for shipment and load it on the large

line-haul or road trucks for transportation to another terminal. Bills of lading and freight bills are made out at the terminal offices. The loaded trucks are then weighed and placed in charge of special road drivers whose sole duty is to drive the road trucks between terminals. This transportation is accomplished at night, the trucks reaching the terminal of destination early in the morning. When the loaded trucks reach the terminal, the road driver is relieved and the truck is turned over to the terminal employees, who overhaul and service the truck, unload the shipment, sort and classify the freight according to its further disposition. Some of the freight may be destined to another terminal, some of it may be destined to a point which is not on appellant's line, in which case it will be handled by some "inter-line carrier" making connection with the appellant at the terminal, and some of the freight may be destined to points within the 25 mile radius of the terminal covered by the "delivery service." Occasionally, a shipment destined to a point within the 25 mile radius of the terminal constitutes all or a large part of the truck load. In that event, after the truck and load has been checked at the terminal, the road driver relieved, and the shipment otherwise cleared at the terminal, the truck load is later delivered to consignee's door, by the "delivery service" driver. Such a shipment is never delivered by the "road-driver" direct to the consignee, but must always pass through and be dealt with at the terminal, and is delivered by the "delivery service" driver to the consignee's dock.

One of appellant's terminals is located in Kansas City, Kansas, about one-half mile from the Missouri-Kansas line. It was so situated at the solicitation of the owner of the [fol. 161] property in 1932 at a time when appellant was just beginning to operate as a motor carrier. It is a large building with convenient facilities for loading and unloading trucks, parking trucks, handling freight and otherwise transacting a trucking business. At the time when the terminal was located, several other motor carriers were also using the site as a terminal. These were non-competing carriers and none of them competed with appellant. For this reason it was convenient for them to use the same terminal facilities and to establish inter-line connections for the transportation of freight. This terminal is located in close proximity to many large shippers who ship freight

by truck. It is the only terminal which the appellant has ever had in this area. This terminal was located prior to the promulgation by any legal authority of tariffs affecting either interstate or intrastate carriage of property. At the time of this action, published tariff rates disclosed a differential in favor of interstate rates.

From the time of locating the terminal at Kansas City, Kansas, until the early part of 1936 the "pick-up" and "delivery" service in that area was conducted by the Mid-Central terminal, the owner and operator of the premises, under a contractual arrangement with the appellant. All matters pertaining to billing, checking, loading and unloading, weighing, classifying, making pick-ups and deliveries, making inter-line arrangements and making collections were handled by the Mid-Central terminal under said contractual arrangements. No permit was ever obtained by the operator of the Mid-Central terminal, and under the law none was necessary. Under this arrangement shipments were billed from the consignor to the Mid-Central terminal or to the consignee in care of the Mid-Central terminal and then re-billed to the consignee from the Mid-Central terminal. Since the early part of 1936 the Mid-Central terminal has been employed by the appellant as his agent to perform the pick-up and delivery service in the Kansas City, Kansas, area. Under this arrangement shipments are billed to the consignee with a designation on the bill of lading that they are to be transported by way of the Kansas City, Kansas, terminal. The nature and character of this [fol. 162] "pick-up" and "delivery" service are described in the tariffs on file with the Interstate Commerce Commission.

Since the 25 mile radius of the Kansas City, Kansas, terminal necessarily includes a large part of Kansas City, Missouri, appellant carries some shipments from consignors in St. Louis, Missouri, to consignees in Kansas City, Missouri, and from consignors in Kansas City, Missouri, to consignees in St. Louis, Missouri, both by way of the terminal in Kansas City, Kansas, through which such freight must pass for the purpose of performing the functions of checking, weighing, etc., heretofore described. According to the evidence for the appellant this type of transaction constitutes approximately 10% of his total business. According to the evidence for the appellees it constitutes approximately 40 % of the business carried on between the St. Louis, Missouri, and Kansas City, Kansas, terminals.

An investigation to determine whether the appellant was engaging in intrastate commerce contrary to the terms of his interstate permit was closed by final order of the Public Service Commission on July 15, 1935. His interstate permit was revoked by the Public Service Commission by order effective December 31, 1936, upon the alleged ground that his operations between St. Louis, Missouri, and Kansas City, Missouri, by way of his terminals as above described were intrastate in character, and were in violation of his interstate permit. Until the revocation of his permit appellant had paid all of the fees required by the state for the use of the roads. Since that time a tender of the fees was made, but the Public Service Commission refused such tender. Consequently, no fees have been paid since the revocation of appellant's permit. Investigation of appellant's trucks by State officials have continued since the institution of this suit, but no arrests were made because of the pendency of the temporary injunction.

Appellant has filed an application with the Interstate Commerce Commission in compliance with the terms of the Motor Carriers Act of 1935, for a certificate of convenience and necessity, to permit him to continue, under the provisions of section 206 of that act to operate in interstate commerce. This application is still pending and undetermined by that commission.

[fol. 163] Respectfully submitted, D. D. McDonald,  
Frank E. Atwood, Smith B. Atwood, Counsel for  
Appellant.

Service of the above Statement of the Evidence is hereby acknowledged this 12th day of July, 1938.

James H. Linton, Daniel C. Rogers, Attorneys for  
Defendants, Public Service Commission, Roy Mc-  
Kittrick, Attorney General and B. M. Casteel,  
Superintendent of the State Highway Patrol.

Approved, Merrill E. Otis, Judge.

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[fol. 164] IN UNITED STATES DISTRICT COURT

APPELLEES' AMENDED STATEMENT OF THE EVIDENCE—Filed  
August 11, 1938

Without abandoning their position that the only question preserved in the appeal for determination by the Supreme

Court of the United States is the constitutionality of Rule No. 44, and that the determination of the constitutionality of such rule would be a useless gesture because such determination is not dispositive of the case, appellees present this amendment to the statement of the evidence prepared by appellant.

If the Supreme Court of the United States should take jurisdiction of the appeal for the purpose of determining the character of the commerce, which appellees contend has not been preserved in the appeal, the evidence prepared by appellant should be considered as amended and supplemented by the following statement:

[fol. 165] The Act of the Missouri General Assembly involved in this case is the one known as the Missouri Bus and Truck Law, found on pages 304-316, inclusive, Laws of Missouri, 1931.

Under the provisions of Section 5268-(b) and (d) of this Act appellant made application for and was duly granted an interstate common carrier permit to operate over irregular routes in the State of Missouri on November 23, 1934. The essential provisions of said interstate permit are as follows:

"For authority to operate interstate as a freight carrying motor carrier over an irregular route as follows: From all points in Missouri to points beyond the State and from points beyond Missouri to all points within the State, exclusively in interstate commerce."

Appellant, during the period of his disputed operations, has operated approximately seventy pieces of motor equipment between his various termini and has made approximately one hundred thirty truck trips per month between his terminal in St. Louis, Missouri, and his terminal in Kansas City, Kansas, using U. S. Highway No. 40 from St. Louis, Missouri, to Kansas City, Missouri, and thence over city streets to his terminal in Kansas City, Kansas. The terminal in Kansas City, Kansas is located at a distance of less than one half mile from the Missouri state line. On these trips appellant hauled freight originating in St. Louis, Missouri and destined to Kansas City, Missouri, and vice versa, through the terminal in Kansas City, Kansas.

The Supervisor of the Bus and Truck Department of the Missouri Public Service Commission had conducted investigations of appellant's operations for a period of more than one year preceding the revocation of appellant's authority. He was familiar with the exhibits which appellant had in-[fol. 166] troduced in a hearing before an Examiner of the Interstate Commerce Commission, tending to prove movements of freight between St. Louis, Missouri and Kansas City, Missouri. He testified that not less than forty per cent of the freight moving over U. S. Highway No. 40 originated at and was destined to one or the other of the two Missouri cities aforesaid.

At the time of the revocation of appellant's interstate permit by the Missouri Public Service Commission, which became effective on December 31, 1936, appellant was carrying freight on an interstate first class freight rate of sixty cents per CWT between St. Louis, Missouri and Kansas City, Missouri, and vice versa, through the terminal at Kansas City, Kansas. The similar intrastate freight rate established by the Missouri Public Service Commission was ninety-two cents per CWT. Numerous intrastate operators were operating between St. Louis, Missouri and Kansas City, Missouri over U. S. Highway No. 40 and were bound by the ninety-two cent first class intrastate freight rate. Similar differentials in favor of interstate commerce existed on other classes of freight hauled by appellant. His interstate freight tariff quoting interstate rates between the two Missouri cities aforementioned was filed with the Interstate Commerce Commission on April 1, 1936.

In its order of revocation of appellant's interstate permit, which order was introduced in evidence by the appellant himself, the Public Service Commission of Missouri consumed approximately fifteen typewritten pages in discussing the character of the commerce which appellant had been engaged in hauling between the two Missouri cities mentioned. Therein the Missouri Commission stated that [fol. 167] the controlling question for determination was the character of the commerce, and concluded that appellant had

“ \* \* \* resorted to shams, devices and subterfuges which merely give the color of interstate commerce to his transactions; that he has unlawfully sought thereby to exer-

cise valuable rights and privileges never acquired, and to evade regulation by the State of Missouri."

There was introduced in evidence before the three-judge court a transcript of the evidence taken before the Public Service Commission and upon which the order of revocation of the Public Service Commission was based. This transcript, consisting of three hundred thirty-two pages, was principally the testimony of shipper witnesses from St. Louis and Kansas City, summoned by the Public Service Commission to describe the character of the commerce transported between the two Missouri cities mentioned.

A number of those witnesses testified that they did not know until the day of the hearing that their freight was handled through a terminal at Kansas City, Kansas and that they did not direct the appellant as to the routing. They testified that appellant's solicitors encouraged them to use his trucks between the two Missouri cities because of his substantially cheaper interstate freight rates.

In a few sentences the Missouri Commission also decided that appellant had been engaged in the violation of Rule No. 44 promulgated by it.

Additional evidence before the three-judge court tended to prove that large quantities of freight originating in St. Louis, Missouri were billed to the terminal in Kansas City, Kansas, as consignee. Thereafter, billing instructions were given to the terminal for transportation of the freight to consignees in Kansas City, Missouri. The operator of the [fol. 168] terminal testified that these were designated as "pool" or "blanket" shipments. He also testified that individual shippers in St. Louis, Missouri consigned freight to his terminal in Kansas City, Kansas as consignee, which, afterwards, was by him re-billed and transported to the real consignee in Kansas City, Missouri upon instructions of the St. Louis, Missouri shipper. He testified that shipments between St. Louis, Missouri and destinations in Kansas or Colorado were not so handled. He testified that by far the majority of shipments originating in St. Louis, Missouri and destined to consignees in Kansas City, Missouri were handled in this manner. Full trailer loads of freight billed from a single consignor in St. Louis, Missouri to a single consignee in Kansas City, Missouri were driven through Kansas City, Missouri to the terminal in Kansas City, Kansas. Sometimes these full trailer loads were unloaded

at the terminal and thence transported back into Kansas City, Missouri by means of "delivery" trucks. The terminal had one "delivery" truck that was large enough to haul a full truckload off of any one of the road haul trucks. Sometimes these full trailer loads were driven immediately back into Missouri and unloaded at the docks of consignees. The terminal operator testified that such was the usual practice on full trailer loads.

On February 1, 1938, before the trial of this case on its merits, eight of appellant's westbound transport trucks passed over the scales of the Missouri State Highway Commission at a point on U. S. Highway No. 40, a short distance east of Kansas City, Missouri. According to the statements made by the drivers, six of the eight trucks were destined to the terminal in Kansas City, Kansas. Two were destined to Wichita, Kansas. Only one of the drivers of these eight trucks would show the inspector his freight bills. The other drivers declined to produce their freight bills for inspection. [fol. 169] The inspected truck carried a total of 16,900 pounds of freight originating in St. Louis, Missouri, destined to a consignee at North Kansas City, Missouri. It was driven through Kansas City, Missouri to the terminal in Kansas City, Kansas. The inspector personally saw that same trailer load of freight unloaded at docks of consignee in North Kansas City, Missouri a short while afterwards.

Also, on February 1, 1938, another inspector testified that a westbound truck of appellant was found to be carrying a trailer load of paper from a consignor in St. Louis, Missouri to a consignee in Kansas City, Missouri and that he followed that trailer across the Kansas line to the terminal and thence back into Kansas City, Missouri where it was unloaded at the docks of the consignee.

Appellant has applied to the Interstate Commerce Commission for authority to engage in interstate commerce over regular routes between the terminal of St. Louis, Missouri, Kansas City, Kansas, Wichita, Kansas, Des Moines, Iowa and Burlington, Iowa. He makes an intensive use of several of the principal Missouri state highways in transporting freight between these several termini. Such application to

the Interstate Commerce Commission was heard by an Examiner during the month of July, 1937.

James H. Linton, General Counsel; Daniel C. Rogers, Assistant Counsel, Missouri Public Service Commission, Solicitors for Appellees.

Received a copy hereof this 10th day of August, 1938.

D. D. McDonald, Frank E. Atwood, Smith B. Atwood, Solicitors for Appellant.

Approved by consent of parties this 13th of August, 1938.  
Merrill E. Otis, Judge.

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[fol. 170] IN UNITED STATES DISTRICT COURT

PRACIPE FOR TRANSCRIPT OF RECORD—Filed July 12, 1938

To A. L. Arnold, Clerk of the above Court:

You are hereby requested to make a transcript of the record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following, and no other papers, to-wit:

1. Bill of Complaint filed December 31, 1936.
2. Notice of Application by Plaintiff for Temporary Restraining Order with acknowledgment of service thereon filed December 31, 1936.
3. Temporary Restraining Order together with return of service thereon filed January 5, 1937.
4. Separate Answer of Public Service Commission filed January 22, 1937.
5. Separate Answer of Roy McKittrick, Attorney-General of Missouri filed January 22, 1937.
6. Separate Answer of B. M. Casteel, Superintendent [fol. 171] Missouri State Highway Patrol, filed January 22, 1937.
7. Memorandum Opinion and Findings of Fact on Plaintiff's Application for a Temporary Injunction, together with signatures of judges thereto, filed February 3, 1937.
8. Order granting Temporary Injunction filed February 15, 1937.

9. Motion of Defendants to Dissolve Temporary Injunction together with notice of service thereon upon plaintiff, filed April 30, 1937.

10. Supplementary Answer in the Form of a Counterclaim deposited with the clerk February 2, 1938.

11. Memorandum Opinion by Reeves, J., filed March 24, 1938.

12. Separate Concurring Opinion of Stone, Cir. J., filed March 24, 1938.

13. Dissenting Opinion of Otis, J., filed March 24, 1938.

14. Petition for Re-hearing filed April 21, 1938.

15. Order denying petition for re-hearing entered May 10, 1938.

16. Decree denying permanent injunction and appointing Jay M. Lee as Special Master entered May 10, 1938.

17. Petition for Appeal.

18. Assignment of Errors and Prayer for Reversal.

19. Statement of basis on which appellant contends that the Supreme Court of the United States has appellate jurisdiction.

20. Order allowing the appeal.

20½. Order approving appeal bond.

21. Citation together with acknowledgment of service thereof by appellees.

22. Statement directing attention of appellees to Rule 12 (3) together with acknowledgment of service of such statement and copies of the petition for and order allowing the appeal, the Assignment of Errors, and Statement as to jurisdiction, by the appellees.

[fol. 172] 23. Statement of Evidence together with acknowledgment of service thereof by appellees.

24. This praecipe together with acknowledgment of service thereof by appellees.

You are requested to prepare this transcript as required by law and the rules of this court and the rules of the Supreme Court of the United States of America, and to file the same in the office of the Clerk of the United States Supreme Court in the city of Washington, D. C., on or before the 20th day of August, 1938, or at such later date as may

be designated in an order of this court enlarging and extending said time.

Dated this 12th day of July, 1938.

D. D. McDonald, Frank E. Atwood, Smith B. Atwood,  
Counsel for Appellant.

Service of the above praecipe accepted and acknowledged this 12th day of July, 1938.

James H. Linton, Daniel C. Rogers, Attorneys for  
Defendants and Appellees.

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[fol. 173] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME FOR FILING TRANSCRIPT OF RECORD—  
Filed August 13, 1938

For satisfactory reasons appearing to the Court the time for filing the record in this case in the Supreme Court of the United States of America, pursuant to the appeal allowed and the citation issued herein, is extended to the 19th day of September, 1938.

Merrill E. Otis, Judge.

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[Fol. 174] Clerk's certificate to foregoing transcript omitted in printing.

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[Fol. 175] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS OF RELIANCE, AND DESIGNATION OF  
NECESSARY PARTS OF THE RECORD—Filed September 24,  
1938

Comes now appellant in this cause and hereby files his statement of the points on which he intends to reply in this appeal, as follows:

I

The order of the Public Service Commission of Missouri revoking its previously granted interstate permit upon the ground that certain of appellant's transactions of freight transportation were conceived by said Commission to be intrastate in character, is tantamount to an unconditional

denial of appellant's right to engage in other transactions which were admittedly interstate in character. This order was therefore void and of no force or effect.

## II

In so revoking its interstate permit said Commission usurped the field of congressional authority, and unlawfully deprived appellant of his rights and property without due [fol. 176] process of law which are guaranteed both by the state and federal constitutions.

## III

The transactions of freight transportation of which the Public Service Commission of Missouri complains are characterized as "interstate commerce" in the definition of that term as found in the Motor Carriers Act of 1935, notwithstanding a contrary definition inferred from said commission's Rule 44, or otherwise (U. S. C. A. Title 49, section 303(a)-(10)). The right to engage in such commerce is not derived from the state of Missouri, and it cannot therefore be unconditionally denied by that state or any of its agencies upon any grounds.

## IV

The District Court erroneously adopted the Public Service Commission's characterization of said freight carriage transactions as intra-state, viewing them in the light of that Commission's definition as derived from its Rule 44 and other considerations, ignored the congressional definition of "interstate commerce", refused to enjoin the void order of the Commission and thereby denied appellant the equal protection of the laws which is guaranteed both by the State and Federal constitutions.

## V

Rule No. 44 of the Public Service Commission of Missouri should not be construed as applicable to the transactions of freight transportation of which said Commission complains. If, however, said rule is so construed as to render it applicable to said transactions it is unconstitutional and void because it is in direct conflict with the provisions of the Motor Carrier Act of 1935.

## VI

Appellant can not be denied the right to challenge the validity of Rule No. 44 of the Public Service Commission [fol. 177-180] of Missouri because of the acceptance of an interstate permit which is so construed by the court as to impose invalid and unconstitutional conditions.

## VII

The Public Service Commission of Missouri is devoid of any authority to maintain an action in its name to recover statutory fees alleged to be due the State for use of its highways. That right of action, if any, is reposed by statute in the Treasurer of the State of Missouri. (Sec. 5272(a), Laws of Missouri, 1931, page 311.) Absent the right to maintain such an action, the Commission could not maintain it in the form of a counterclaim in this suit. Furthermore, such a claim not being equitable in nature, could not be "the subject of an independent suit in equity" within the meaning of Equity Rule 30.

The District Court therefore erred in allowing recovery on appellee's counterclaim.

Appellant states that this is a suit in equity in which a counter-claim was filed and allowed, based upon facts not cognizable in an equitable action; that he believes all of the transcript of the record is necessary for a consideration of the above points, and he therefore requests that said record be printed in toto.

D. D. McDonald, Frank E. Atwood, Smith B. Atwood,  
Counsel for Appellant.

Service of copy of the within document is hereby acknowledged this 22 day of Sept. 1938.

James H. Linton, Daniel C. Rogers, Attorneys for  
Appellees.

[fol. 181] [File endorsement omitted.]

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Endorsed on cover: Enter Frank E. Atwood. File No. 42,852. W. Missouri D. C. U. S. Term No. 367. Frank Lichholz, appellant, vs. Public Service Commission of the State of Missouri, et al. Filed September 20, 1938. Term No. 367, O. T., 1938.

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